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Chilean Consumer Protection Standards and the United Nations Guidelines on Consumer Protection: A Comparative Study Revealing Regional Conflicts

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Cover Page Footnote

International Law; Commercial Law; Law

Chilean Consumer Protection Standards and the United Nations Guidelines on Consumer Protection: A Comparative Study Revealing Regional Conflicts

Robert G. Vaughn[†]

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I. Introduction

Chile represents an economic and political success story—perhaps *the* economic and political success story—of South America. Chile has made a successful transition from military to democratic rule;¹ economic reforms begun by prior military governments have been continued by succeeding democratically elected governments.² The economy, organized around free market and free trade principles, now possesses impressive rates of growth and foreign investment.³

¹ See generally Samuel Chavkin, *STORM OVER CHILE: THE JUNTA UNDER SIEGE* (1985)(describing the 1973 military coup and the repression following); NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, *CHILE'S TRANSITION TO DEMOCRACY* (1988)(describing the 1988 presidential plebiscite).

² See David Gilmore, *Regional Report: Expanding NAFTA to Include All of the Western Hemisphere: Making Chile the Next Member*, 3 J. INT'L L. & PRAC. 413, 413-14 (1994) (discussing Chile's peaceful transition to a democratic government); see also Enrique R. Carrasco, *Autocratic Transitions to Liberalism: A Comparison of the Chilean and Russian Structural Adjustment*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 99 (1995) (discussing the economic structural transition in the democratization of Chile).

³ Gilmore, *supra* note 2, at 413-14 (remarking that Chile has sustained economic growth since democratization); Roger Turner, *Chile Sets an Example for Others to Follow*, BUS. AM., May 1994, at 18 (reporting that Chile has shown the highest Latin American economic growth since 1985); Clyde Mitchell, *Entering the Chilean Market*,

Not surprisingly, Chile has become the most often mentioned possible addition to the North American Free Trade Agreement,⁴ an agreement that officially opened the markets of Canada, Mexico and the United States to each other.⁵ In 1995 the Clinton administration authorized the opening of negotiations with Chile regarding its inclusion in NAFTA.⁶ Although these negotiations have since stalled, they perhaps foreshadow a larger free trade zone potentially involving other countries in South America.⁷

Both the Chile House of Deputies⁸ and Senate⁹ are now considering proposals for a comprehensive consumer protection statute focusing principally upon consumer transactional law. The Chilean proposals exemplify the enactment of similarly comprehensive codes by a number of South American countries.¹⁰ These codes, which also apply to consumer transactional law, have emphasized the quality and safety of products and services. The

N.Y. L.J., Jan. 17, 1996, at 3 (Chile has "achieved 11 years of positive growth," received an A- Standard and Poor's country risk rating, and has experienced a dramatic increase in the gross domestic product and a decrease in inflation).

⁴ North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (1993) [hereinafter NAFTA].

⁵ Kevin M. Jordon, Comment, *Intellectual Property under NAFTA: Is Chile Up to the Challenge?*, 2 TULSA J. COMP. & INT'L L. 367 (1995) (discussing President Bush's interest in including Chile in NAFTA). In 1994 Chile made the U.S. aware of its desire to join NAFTA. *Id.*

⁶ Jordan, *supra* note 5, at 370-71. Following the Summit of the Americas, a meeting of the 34 democratically-elected leaders of the Western Hemisphere focusing on trade issues, the U.S., Canada and Mexico extended an invitation to Chile to begin NAFTA negotiations. *Id.*

⁷ See 141 CONG. REC. D1251-01 (daily ed. Oct. 25, 1995) (statement of William E. Barreda, Deputy Assistant Secretary for International Trade and Investment, U.S. Department of the Treasury) (noting the expansion of NAFTA to Chile would expand markets for the U.S. as well as encourage other Latin American nations to pursue free trade agreements). Following delay in negotiations with the United States, Chile, in June of this year, became an associate member of the Southern Common Market (MERCOSUR), Treaty of Asuncion, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041, the South American trading pact containing Brazil, Argentina, Paraguay, and Uruguay. Laurie Goering, *Chile Joins S. American Trade Pact*, CHI. TRIB., June 26, 1996, at B1.

⁸ LEY DE LOS DERECHOS DE LOS CONSUMIDORES [LAW OF CONSUMERS RIGHTS] (proposed 1991) [hereinafter HOUSE OF DEPUTIES PROPOSAL].

⁹ LEY DEL PROYECTO DE LEY RELATIVO A LOS DERECHOS DE LOS CONSUMIDORES [LAW OF PROTECTION RELATING TO THE PROTECTION OF CONSUMERS] (proposed 1995) [hereinafter SENATE PROPOSAL].

¹⁰ See generally, Robert G. Vaughn, *Consumer Protection Laws in South America*, 17 HASTINGS INT'L & COMP. L. REV. 275 (1994).

explosion of consumer statutes in South America, as well as the prominence of Chile and the success of its economy, recommend an examination of its consumer standards.

The content of the Chilean proposals implicates a number of issues relevant to the addition of Chile to NAFTA. The trade relationship between the United States and Chile envisioned by the addition makes the proposed Chilean consumer statute of clear interest to companies exporting consumer goods to Chile. These proposals could alter the legal environment in which U.S. companies now operate. In this regard, an examination of the complete body of the proposals is important.

The Chilean consumer provisions also could influence the effectiveness of U.S. consumer laws. The experiences of the European Economic Community (EEC)¹¹ and the Southern Common Market (MERCOSUR)¹² illustrate that trading unions create incentives for the reconciliation of conflicting consumer provisions. A country's consumer and safety standards arguably have an effect on trade because they impose additional costs of compliance on importers: enforcement of the standards protects specific domestic industries and creates opportunities for inappropriate preferences among trading partners. Similarity among the consumer statutes of trading nations eases the difficult process of reconciliation.¹³

Harmonization of consumer provisions also reduces the concerns, illustrated by debates regarding NAFTA and the Uruguay Round of GATT, about the effect of trade agreements on domestic U.S. safety and environmental laws.¹⁴ Although the

¹¹ See generally, XAVIER LEWIS, *THE PROTECTION OF CONSUMERS IN EUROPEAN COMMUNITY LAW* IN YEARBOOK OF EUROPEAN LAW (A. Arau & D.A. Wyatt eds., 1992); Jacques Delors, *The Future of Free Trade in Europe and the World*, Address at Chydenius Seminars (July 22, 1994), in 18 *FORDHAM INT'L L. J.* 715, 719 (1995) (explaining the development of a single common market in the European Union).

¹² See generally, Jean Arrighi, *Integration and Consumer Protection: The Case of Latin America*, 15 *J. CONSUMER POL'Y* 179 (1992).

¹³ Paulee A. Coughlin, Comment, *The Movement of Consumer Protection in the European Community: A Vital Link in the Establishment of Free Trade and a Paradigm for North America*, 5 *IND. INT'L & COMP. L. REV.* 143, 144 (1994) (discussing how the fears of the EEC member countries regarding the destruction of their consumer laws were alleviated by the "harmonization of national consumer laws and the creation of community-wide health and safety standards . . .").

¹⁴ See Robert L. Heckart and Tira Harpaz, *NAT'L L.J.*, Dec. 21, 1992, at 17

NAFTA debate has focused more on environmental and labor standards than consumer laws,¹⁵ the principles involved apply to consumer laws as well.¹⁶ Provisions in the NAFTA implementing legislation ensure that neither federal nor state law will be invalidated without specific action by the United States government seeking such invalidation.¹⁷

Special NAFTA provisions, the so-called sanitary or phytosanitary measures, address domestic laws designed to protect animal and plant life from pests and disease, and human and animal life from risks created by additives, contaminants, toxins, or disease-carrying organisms in food, beverages, or foodstuffs.¹⁸ The agreement requires that these standards be maintained only as long as a "scientific" basis for them exists and that the standards be supported by an appropriate "risk assessment."¹⁹ NAFTA also commits the parties, consistent with the level of protection provided by their measures, to "pursue equivalence" of their respective standards.²⁰ Commentators have suggested that the breadth of the language and the complexity of the subjects is likely to generate a number of disputes.²¹

Other health and safety regulations, including regulation of product safety, raise similar issues regarding their impact on trade. Conflicts between the consumer standards of members of a free

(contrasting the opinion of Environmental Protection Agency Administrator, William K. Reilly, who called the NAFTA agreement "the most environmentally sensitive trade agreement ever negotiated" with the opinions of environmentalists and some members of Congress who believed environmental protections were given insufficient consideration in the agreement).

¹⁵ The North American Free Trade Agreement contained two side agreements regarding the environment, North American Agreement on Environmental Cooperation, Sept. 13, 1993, U.S. - Mex. - Can., 32 I.L.M. 1482 (1993), and labor, North American Agreement on Labor Cooperation, Sep. 13, 1993, U.S. - Can. - Mex., 32 I.L.M. 1499 (1993). These side agreements reflected the concern of the impact of the agreement on U.S. laws.

¹⁶ Indeed, the sanitary and phytosanitary standards of NAFTA address the concerns raised in the debate in the context of consumer health and safety standards. See *infra* notes 17-21 and accompanying text.

¹⁷ North American Free Trade Agreement Implementation Act, 19 U.S.C. §§ 3301-473 (1994).

¹⁸ NAFTA, *supra* note 4, art. 712, 33 I.L.M. 377-78.

¹⁹ *Id.*

²⁰ NAFTA, *supra* note 4, art. 714(1), 33 I.L.M. 378.

²¹ Jeffrey P. Biolos & Deborah E. Siegel, *Dispute Settlement under the NAFTA, the Newer and Improved Model*, 27 INT'L 326, 339 (1993).

trade agreement therefore can generate similar disputes and create the same pressures toward reconciliation reflected in the more explicit terms of NAFTA. The agreement suggests that product safety standards are particularly important, but the pressure toward reconciliation of standards also suggests the need to examine Chile's consumer protection proposals as a body of law containing judgments on a general philosophy of consumer protection as well as judgments on specific topics. Reconciliation of individual provisions necessarily occurs against the broader policies and perspectives incorporated into consumer laws.

The negotiation with Chile will surely address these contentious issues because of Chilean concerns with non tariff barriers to the importation of Chilean products, particularly produce.²² Chilean consumer provisions similar to U.S. standards ease the resolution of this issue. Stronger Chilean consumer laws also should reduce concerns of U.S. negotiators that Chile will likely raise objections in the future to U.S. regulatory standards.

Other members of NAFTA may share similar concerns. Therefore, the consumer statutes of the NAFTA members create an appropriate standard against which to evaluate the Chilean consumer protection proposals. In fact, the consumer transactional law of the NAFTA partners are quite similar. The similarity between U.S. and Canadian provisions is not surprising; the similarity of U.S. and Mexican consumer statutes rests on the substantial influence that U.S. statutes had on the content of the Mexican ones.²³ Therefore, the analysis of the Chilean proposals based on the consumer law of the NAFTA members emphasizes the law of the United States augmented by discussion of the Canadian and Mexican statutes.

²² "Non-tariff barriers are also of interest to Chileans, as they previously encountered marketing orders establishing quality controls that they consider an unfair burden on some of their agricultural products." Claudio Grossman, *The U.S. and Chile: The Convenience Of A Free Trade Agreement in LE LIBRE-ECHANGE DANS LES AMERIQUES (UNE PERSPECTIVE CONTINENTALE)* [FREE TRADE IN THE AMERICAS (AN HEMISPHERIC APPROACH)] 451, 455 (N. Lacasse & L. Perret eds., 1994); William H. Carlile, *Politics May Stall NAFTA Vote*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Nov. 1, 1995, at D1.

²³ Jorge A. Vargas, *An Overview of Consumer Transactional Law in Mexico: Substantive and Procedural Aspects*, 10 N.Y.L. SCH. J. INT'L & COMP. L. 345, 345 (1989).

A principled evaluation of the Chilean proposals, however, suggests that other standards should be used as well. Concerns regarding a type of "legal imperialism" as well as the persuasiveness of any evaluation recommends looking beyond the laws of the NAFTA members. Indeed, it recommends looking to other standards first. The study of other standards helps to illustrate that to the extent the Chilean standards are less strict, they are in fact superior because they represent less intrusion into the private market and are more consistent with the economic principles underlying free market economies.

The United Nations Guidelines on Consumer Protection,²⁴ passed by the General Assembly of the United Nations in 1985, offer a principled way of evaluating the Chilean standards.²⁵ The U.N. Guidelines contain general principles enacted after lengthy consideration, principles that have become accepted as standards for consumer protection laws.²⁶ By their character, the U.N. Guidelines are general and the conclusions drawn from their application dependent in part on the political and economic context to which they are applied. For this reason, the application of the U.N. Guidelines benefits from an examination of other South American consumer statutes. Among these provisions, that of Brazil is the most comprehensive. The provisions of Argentina and Venezuela also contain significant protections.²⁷

The South American statutes reflect conditions similar to those encouraging proposals for consumer protection in Chile—the development of free market economies and the replacement of authoritarian governments with ones democratically elected.²⁸ Therefore, these regional laws reflect judgments addressing similar, though far from identical, political and economic

²⁴ G.A. Res. 248, U.N. GAOR, 2d Comm., 39th Sess., 106th mtg. at 179, U.N. Doc. (1985).

²⁵ See generally Vaughn, *supra* note 10.

²⁶ David Harland, *The United Nations Guidelines for Consumer Protection*, 10 J. CONSUMER POL'Y 245, 262 (1987); Development and International Economic Cooperation, Consumer Protection: Report of the Secretary-General, U.N. ESCOR, 48th Sess., Agenda Item 12(j), at 9, U.N. Doc. E/1992/48 (1992).

²⁷ Other South American statutes, such as those of Colombia, Ecuador, and Peru also offer insights that support the conclusions drawn.

²⁸ Vaughn, *supra* note 10, at 287-91.

circumstances. These regional laws permit an examination of the application of the principles contained in the U.N. Guidelines in the context of contemporary South America. In addition, the availability of these contemporaneous models available to Chile highlights distinctions between the Chilean proposals and the regional standards reflected in these statutes.

The South American consumer statutes have special relevance to the U.N. Guidelines. One of the three regional seminars subsequent to the adoption of the Guidelines covered Latin America and the Carribean.²⁹ Consumer groups, represented by the International Organization of Consumers Unions (now Consumers International) relied on the U.N. Guidelines in drafting a model statute for the region, a statute that has had considerable influence.³⁰ The IOCU also used the Guidelines to urge the adoption of comprehensive consumer statutes³¹ For these reasons, the U.N. Guidelines and the South American consumer statutes show considerable correspondence.³² This correspondence demonstrates an attempt by several countries in the region to follow the Guidelines. Therefore, the South American statutes can be seen as representing interpretations of the U.N. Guidelines by other countries in the region.

The application of the U.N. Guidelines, augmented by the regional statutes of North and South America, to the proposals for a Chilean consumer protection statute demonstrate that these proposals are seriously deficient. The proposals fail to satisfy important principles articulated in the U.N. Guidelines.³³ Particularly distressing is the inadequate attention to assurances of product quality and safety.³⁴ The differences between the Chilean

²⁹ *Id.* at 284.

³⁰ *Id.* at 284-87.

³¹ *Id.*

³² *Id.* at 284.

³³ See *infra* notes 181-83 and accompanying text for a discussion of credit conditions. See *infra* notes 210-16 and accompanying text for a discussion of consumer information. See *infra* notes 258-60 and accompanying text for a discussion of contractual abuses. See *infra* notes 282-86 and accompanying text for a discussion of product durability, utility, and reliability. See *infra* notes 313-18 and accompanying text for a discussion of health and safety. See *infra* notes 373-77 for a discussion of enforcement.

³⁴ See *infra* notes 282-86, 313-18 and accompanying text.

proposals and the U.N. Guidelines suggest different philosophies of consumer protection.

Part II of this article describes and examines the Chilean proposals for a comprehensive consumer protection statute.³⁵ Generally, the bill passed by the House of Deputies of the Parliament of Chile is substantially broader than that emerging from the Senate.³⁶ Both legislative proposals diverge from the sources initially used to draft a proposal for legislation.

In Part III the article evaluates these proposals against the U.N. Guidelines and the South and North American provisions; the proposals are first evaluated against the principles of the U.N. Guidelines and then against the regional standards emerging from the South American statutes, particularly those of Brazil, Argentina and Venezuela.³⁷ Finally, the Chilean proposals are compared to laws of the NAFTA members. These regional standards permit more specific contrasts with the Chilean proposals. Overall, the comparisons demonstrate that one, and often both, of the Chilean proposals fails to comply with one or more of the Guidelines. In some instances, although some proposals arguably comply with specific guidelines, examination of the proposals against the regional standards casts doubt on the effectiveness of the proposals when measured against general implementation of the U.N. Guidelines. Even in instances where the proposals seem to comply with the Guidelines, the regional standards suggest that the compliance is minimal or marginal.

The implications of the conflict between the Chilean standards and the U.N. Guidelines are examined in Part IV.³⁸ This conflict suggests greater attention to consumer standards in trade

³⁵ See *infra* notes 39-176 and accompanying text.

³⁶ The Senate version may be broader in part because of the composition of the Senate. The Senate membership is composed of elected senators, former presidents (who serve for life), nine former members of the Supreme Court elected by the present Supreme Court, and one senator who must be a former comptroller general elected by the Supreme Court. Also included in the Senate are the former commanders of each of the armed services (army, navy, air force, and carabineros) elected by the National Security Council; a former university rector and a former minister of state appointed to the Senate by the President. CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE DE 1980 [CONSTITUTION OF CHILE], art. 45.

³⁷ See *infra* notes 177-415 and accompanying text.

³⁸ See *infra* notes 416-18 and accompanying text.

arrangements in both South and North America. In addition, the variations from other South American statutes implies a broader disagreement about the philosophy of consumer protection; a disagreement echoing the debate surrounding the adoption of the U.N. Guidelines. Only a detailed examination of the Chilean proposals permits a confident assessment of the consumer protection philosophy embodied in them.

II. The Chilean Proposals

The initial proposals of the Consumer Service of Chile drew on a number of sources but particularly the U.N. Guidelines, the Mexican Federal Consumer Protection Act of 1975, the Brazilian Consumer Protection Code of 1990, as well as some provisions of Spanish law. In addition, the section on advertising regulation relied in part on the French Code.³⁹ Therefore, the proposal began with an examination and incorporation of principles from several comprehensive statutes as well as the U.N. Guidelines. Neither the proposals of the House of Deputies nor of the Senate provide the protections found in these statutes originally drawn upon.

This section details the proposals and its general structure. This presentation provides the background and context of those parts of the proposals examined in more detail in Part II.

The version approved by the House of Deputies dates from August 1991; the Senate version from March 1995. The membership of the House of Deputies and the Senate varies, particularly in that a number of the members of the Senate are appointed and not popularly elected.⁴⁰ Legislation must pass each house of Parliament and requires the assent of the President of the Republic.

A. *Consumer Rights.*

The proposal articulates a number of consumer rights.⁴¹ These rights include the right 1) to freely select goods or services in the

³⁹ Interview with Juan Pablo Lorenzini Paci, Assistant to the Director of the Consumer Service of Chile, in Santiago, Chile (Aug. 5, 1992) (notes on file with author).

⁴⁰ See *supra* note 36.

⁴¹ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 4.

appropriate market for them, 2) to receive truthful and timely information regarding products and services necessary to exercise choices in the market, 3) to equal and nondiscriminatory treatment, 4) to access safe products and services, 5) to adequate and timely compensation for violations of the statute, and 6) to education for informative consumer choices.

Although these rights as stated are seemingly admonitory in character, they display the premises supporting the legislation and offer assistance in the interpretation of its provisions. These rights assume a free and operating market in consumer products and services, and regulation occurs against this background. In this sense, as with other consumer laws in South America, the law addresses failures in those markets resulting from the disparate power between consumers and producers due in part to adequate consumer information.

Not surprisingly, these rights emphasize the importance of consumer choice and information necessary for intelligent choices. Equally predictable is the statute's attempt to regulate specific abuses preying on consumer weakness and its attempt to establish minimum requirements for market procedures as well as product and service performance and safety. Because these rights are legislatively articulated and reflect basic premises underlying regulation, they may be used to interpret and apply more specific provisions of the proposal.

The Senate version of these rights emphasizes consumer responsibilities.⁴² For example, concerning the right to access safe products and services, the Senate version adds the consumers' duty to avoid risks that may affect one's safety in their use.⁴³ To the right of education regarding consumer choices in the market, the Senate version adds "the duty to honor" the rules regulating commerce and the market.⁴⁴

⁴² SENATE PROPOSAL, *supra* note 9, art. 3.

⁴³ *Id.* art. 3(d).

⁴⁴ *Id.* art. 3(f). The Senate proposal also limits the right to timely redress by restricting it to repair and compensation of all material and moral damages in the event of non-fulfillment of that which is provided in this law. *Id.* art. 3(e). This limitation may convey a desire that these consumer rights not be treated as organic but rather as general articulations of the specific provisions of the proposal.

B. Provisions Regarding Credit Sales and Consumer Contracts

When the consumer is granted credit as part of a sale of a product or service, the creditor must provide the consumer with sufficient information to evaluate the credit extension.⁴⁵ This information includes 1) the price of the good or service, 2) the existing monthly rate of interest and the delayed payment interest rate (this information must be explicitly stated in the relevant documents), 3) the amount of any additional payments that may be collected by law, and 4) the number and period of payments.⁴⁶ The Senate version adds that goods exhibited in window displays must contain the price of the good, existing monthly rate of interest, and the rate of interest for delayed payment.⁴⁷ These obligations provide information necessary for the consumer to evaluate the offer of credit.

Providers of goods or services must respect the terms under which the goods or services have been offered or the terms agreed upon by the parties.⁴⁸ Providers may not refuse to sell products or services offered to the public as a whole.⁴⁹ Likewise, they may not condition the sale of one product or service on the purchase of another unless this condition has been made part of the offer to the public as a whole.⁵⁰ These obligations seem unexceptional, particularly the requirement contract compliance. The import of these obligations, however, is somewhat broader.

In one way these provisions ensure that providers do not discriminate against the consumer population. The requirements that goods be offered to each consumer on the terms offered to the public, that goods offered to the public not be withheld from an individual consumer, and that tie-in arrangements not be imposed upon subgroups of consumers all reflect the need to insure uniform treatment of consumers. Uniform treatment reduces the likelihood

⁴⁵ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 31.

⁴⁶ *Id.*

⁴⁷ SENATE PROPOSAL, *supra* note 9, art. 29.

⁴⁸ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 6.

⁴⁹ *Id.* art. 8.

⁵⁰ *Id.* The provision does not prohibit such tie-in arrangements but does prevent their use selectively with different groups of consumers. *Id.*

that producers will rely on social or class considerations when dealing with consumers. It also limits the ability of providers to take advantage of the particular susceptibilities of specific individual consumers or groups of consumers. In this sense, these obligations reflect more general ones contained in some statutes that providers of goods and services not take advantage of consumer weaknesses regarding age, education, social or economic standing or mental capacity.⁵¹

Certain provisions in adhesion contracts are prohibited where clauses have been proposed unilaterally by the provider without giving the consumer an opportunity to discuss the terms.⁵² No effect will be given to adhesion contracts that contain any of the prohibited clauses.⁵³ The offending clauses cannot be eliminated to uphold contract.

Clauses or stipulations that invalidate an adhesion contract include 1) granting one party the unilateral right to dissolve the contract, 2) provisions for price increases for services, accessories or extra charges (such a clause is permissible if the increases correspond to additional services, are set out clearly and separately, and entitle the consumer to accept or reject them in each case), 3) consumer charges for errors or administrative problems not "directly imputable" to the consumer, 4) alteration of the burden of persuasion for the proof of damages, 5) disclaiming consumer rights under the statute, and 6) limitations on compensation for the failure of a product or service to perform its "essential purpose."⁵⁴

⁵¹ Wealth disparities in South America require protection of classes of consumers from exploitation and abuse. The House of Delegates proposal to this extent reflects a somewhat explicit consideration of class power. Some South American statutes specifically prohibit exploitation of the poor and uneducated. See e.g., CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, 11 de setembro de 1990, art. 39, translated in DAVID D. JAFFE & ROBERT G. VAUGHN, SOUTH AMERICAN CONSUMER PROTECTION LAWS 89 (1996). Sellers may not take advantage of the "consumer's weakness or ignorance due to age, health, knowledge or social standing to force the consumer to accept their products or services." *Id.*

⁵² HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 10. An adhesion contract is one "whose clauses have been proposed unilaterally by the provider without having allowed the counterpart, in order to conclude the contract, to discuss its contents." *Id.* art. 2(7).

⁵³ *Id.* art. 10.

⁵⁴ *Id.* art. 10(a)-(f).

In addition, the proposal addresses the appointment of an arbitrator by the provider in the adhesion contract.⁵⁵ Because the statute does not prohibit its inclusion of such a provision, it does not invalidate a adhesion contract. The proposal, however, permits the consumer to ask the courts to designate a different arbitrator.⁵⁶

Clauses permitted in adhesion contracts must be clearly written in Spanish, easily comprehensible, and legible to a person of ordinary eyesight.⁵⁷ Clauses must be comprehensible without reference to other documents or materials unless the matter is one of general public knowledge or the other materials have been furnished to the consumer "simultaneously with the completion of the contract."⁵⁸

The Senate version takes a substantially different approach to adhesion contracts. First, adhesion contracts may contain clauses that renounce rights conferred by law if these clauses are "explicit" in "highlighted form," and specifically signed by the consumer.⁵⁹ Adhesion contracts containing these provisions may not be in force for more than one year without express agreement by the consumer to a renewal of the contract.⁶⁰ Therefore, the specific

⁵⁵ *Id.* art. 10. The ability of one of the parties to appoint the adjudicator of a dispute is a significant power. The contemplated provision goes beyond the choice of arbitration rather than judicial recourse and involves the appointment of a specific arbitrator.

⁵⁶ *Id.* The provision providing redress to the courts to obtain the designation of a different arbitrator does not suggest the standards to be used in determining whether such a designation is required.

⁵⁷ *Id.* art. 11.

⁵⁸ *Id.*

⁵⁹ SENATE PROPOSAL, *supra* note 9, art. 11. The Senate proposal attempts to ensure that the consumer has knowledge of the waiver of rights contained in the contract. *See id.* In addition to the provisions noted, the proposal requires an explicit and highlighted statement at the beginning of the contract that it contains provisions that renounce rights provided by the law. *Id.* Although these requirements increase the likelihood of consumer recognition of the effect of the waivers, they do little to address the inequality of bargaining power that often accompanies adhesion contracts.

⁶⁰ SENATE PROPOSAL, *supra* note 9, art. 12. This limitation weakens the effect of the renunciation because a consumer dissatisfied with the terms can in essence attempt to renegotiate the contract by refusing to consent to an extension. Presumably, the entire contract would not at that point be subject to renegotiation nor the seller have the right to alter other terms if the consumer refuses to consent to an extension. Otherwise, the inequality that permitted the demand of the waiver in return for the contract or in exchange for other contracts would make it unlikely that the requirement of express

prohibited clauses, including the appointment of an arbitrator, are removed by the Senate version.

Second, although adhesion contracts generally must be in Spanish, in order to be enforceable against the consumer, adhesion contracts not in Spanish are enforceable if “expressly accepted” by the consumer by signing a document accompanying the contract.⁶¹ Presumably, this accompanying document must be in Spanish as well as in the other language.

The Senate version emphasizes one interpretative rule. Individual terms added by the parties will prevail over conflicting terms of the adhesion contract.⁶²

The proposal regulates the use of the terms “guarantee” or “guaranteed.” These terms may be used on or in regard to a product or service only when the character of the guarantee and its terms and conditions are set out.⁶³ The Senate version does not include this provision

Providers must make available the price of goods; stated prices are understood to be the total value of the goods including relevant taxes.⁶⁴ The Senate version adds the same requirement to services and emphasizes that the price must be “clearly visible” in order to empower consumer choice.⁶⁵ However, when the seller does not provide the price of each product with that product, the seller must maintain a list of prices available to the consumer in a “permanent

agreement would result in change in other than a small percentage of contracts. If only the renunciation is subject to reconfirmation, the original justification for permitting such renunciations seems considerably weakened.

Arguably, the renunciation of rights is not imposed simply because of the bargaining advantage of the seller but because the purchaser may benefit through other contractual provisions in return for the renunciation. If the term of the renunciation is limited, however, the seller's incentive and the rationale for such an exchange seems to be significantly reduced. In any event, it is unclear whether the requirement of express reauthorization, given the nature of the contracts, is likely to be other than a formal acquiescence little different than the original agreement. In addition, there may be instances where the term and character of the contract make the need for express renewal of the renunciation of little value.

⁶¹ *Id.* art. 13.

⁶² *Id.*

⁶³ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 25. Particularly, the guarantee must indicate the ways in which the consumer can exercise the rights contained in it.

⁶⁴ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 23.

⁶⁵ SENATE PROPOSAL, *supra* note 9, art. 25.

and visible" manner.⁶⁶

Commercial information displayed on products, manuals, instructions, and guarantees must be understandable, legible, and expressed in Spanish, in the national currency, and in the metric decimal system.⁶⁷ The provider may give the same information in another language, currency, or measure as long as the information is set out as required by the statute.⁶⁸

The statute enforces product labeling required under other provisions.⁶⁹ The failure to label the goods violates the consumer code, as does concealing or altering a required label.⁷⁰

The regulation of sales does not expressly give consumers any right to cancel a sale made door-to-door, by telephone or by mail.⁷¹ The proposal permits an adhesion contract, almost surely drafted by the provider, to allow dissolution unilaterally by the buyer when concluded through a door-to-door sale, mail, or by sampling.⁷² If the provider does not establish this right, the proposal does not give it. Because this attention to door-to-door sales was part of the section prohibiting some specific clauses in adhesion contracts, the Senate removal of that section eliminates this relevant language as well.⁷³

The Senate version also permits products to be sold with used or rebuilt parts if the consumer receives express notification of this on the product, its packaging or on accompanying invoices or documents.⁷⁴ That version approves specific language as sufficient notification. The terms "second selection" and "made with used parts" are specifically approved along with "other equivalent

⁶⁶ *Id.*

⁶⁷ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 24

⁶⁸ *Id.*

⁶⁹ *Id.* art. 26.

⁷⁰ *Id.* This standard, however, only applies if the provider is obligated to label the goods that are sold or supplied. *Id.* This standard therefore enforces other obligations rather than creating them.

⁷¹ *Id.* art. 10(a). The provision regarding cancellation of these sales is an exception to the prohibition that adhesion contracts do not grant to one of the parties the ability to unilaterally dissolve a contract. The provision therefore simply permits but does not require that consumers be given a contractual right to cancel these sales.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ SENATE PROPOSAL, *supra* note 9, art. 9.

expressions.”⁷⁵

C. Advertising and Product Promotion

The proposal prohibits advertising and other communications regarding the product that can create mistaken or false impressions regarding particular types of product or service information.⁷⁶ The particular types of information covered include the components and their total percentage of the product; the benefits explicitly claimed for a product or service; the basic characteristics of the product or service, including dimension, capacity, quantity, or other similar attributes; the origin of the product or place of rendering of the service; the dates of manufacture, harvest, or packaging; minimum life expectancy, and date of expiration.⁷⁷ Also covered by this provision are the conditions under which a guarantee is provided; any prizes, acknowledgments, official approvals or distinctions obtained for the product or service; and the price of the good or service, including the form of payment and the cost of credit.⁷⁸

The Senate version substantially modifies the types of product information to which the provisions applies. The Senate version does not include the following types of product or service information: the dates of manufacture, harvest, or packaging; minimum life expectancy and expiration date; the conditions of any offered guarantee; and prizes, acknowledgments, official approvals or distinctions.⁷⁹

In any dispute regarding the accuracy of the advertising where the product or service has caused injury to the consumer, the advertiser must submit evidence sufficient to support the claims made regarding the characteristics, properties, and quality of the goods or services.⁸⁰ Excluded from this requirement of

⁷⁵ *Id.*

⁷⁶ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 22.

⁷⁷ *Id.* art. 22(a)-(d). The proposal imposes fines if false information is disseminated through advertising in the mass media regarding any of the types of information contained in Article 22 and that concern public health and safety or damage to the environment. *Id.* art. 19.

⁷⁸ *Id.* art. 22(e)-(g).

⁷⁹ See SENATE PROPOSAL, *supra* note 9, art. 23.

⁸⁰ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 28.

substantiation are claims regarding the benefits of use of the product or service.⁸¹ Finally, upon request by the appropriate government agency, advertising media must identify the advertiser.⁸² The Senate version removes both of these requirements.⁸³

The proposal defines promotions of products or services so as to encompass a number of practices. These practices include: offering another good or service, offering an additional amount of a product, free or at a reduced price; offering two or more similar or different products at one price; permitting the purchasers to take part in lotteries, contests, or other similar events; and including figures or legends on the tops, labels or packaging, or within the packaging, which are not required on the product or on its packaging or labels.⁸⁴ The Senate version defines promotion as a commercial practice offering goods or services to the public in conditions more favorable than normal.⁸⁵ Although less specific, this definition would seem to cover the examples included in the House version. The Senate version, however, excludes from promotion "a simple reduction in price."⁸⁶ These reductions in price would have been considered a promotion under the deleted definition of promotion.

In any promotion the consumer must be clearly and precisely informed of the basis of the promotion.⁸⁷ The seller must also announce the conditions, characteristics, and duration of the promotion.⁸⁸ If the duration of the promotion is not indicated, the promotion will be assumed to continue for an indefinite period until revoked by public announcement equivalent to that which announced the promotion.⁸⁹ Any advertising of a commercial promotion must likewise clearly state the terms and conditions of

⁸¹ *Id.*

⁸² *Id.* art. 27. The disseminator of the advertising as well as the advertising agency have this obligation upon request by the National Consumer Service or by a court. *Id.*

⁸³ See SENATE PROPOSAL, *supra* note 9, art. 23-26.

⁸⁴ HOUSE OF DEPUTIES, *supra* note 8, art. 2(8).

⁸⁵ SENATE PROPOSAL, *supra* note 9, art. 1(7).

⁸⁶ *Id.*

⁸⁷ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 29.

⁸⁸ *Id.*

⁸⁹ *Id.*

the promotion and the ways in which those conditions will be satisfied.⁹⁰

The Senate version also alters other provisions regarding promotions. Advertisers are no longer liable for advertising that misstates or induces error regarding the conditions of promotions, but advertising of promotions must clearly state the terms and conditions of the promotion.⁹¹ In addition, the Senate version requires that the advertisement of the lottery or contest states the amount or specific number of goods to be offered and the period during which they may be claimed.⁹²

D. Consumer Goods

Generally, providers may be liable to consumers for overcharging, for "shorting" the quantity of the product by providing less than indicated on the container or package, and for nonconforming products.⁹³ A consumer who is charged more than the displayed or advertised price may receive the excess paid for the product.⁹⁴ A consumer who is shorted may receive a refund of the excess payment, a replacement of the good, or the quantity of the product necessary to satisfy the price charged.⁹⁵

In certain circumstances, the consumer may, apart from any damages, opt for free repair of the good or return of the product for a replacement, or return of the amount paid if the product fails to conform to certain standards.⁹⁶ A product is treated as nonconforming in four specific circumstances: 1) if the product fails to satisfy mandatory quality or safety standards, 2) if the materials or ingredients of the product do not correspond to the specifications contained on the label, 3) if a product is "not apt" for the use or consumption for which it was designated, or 4) if the

⁹⁰ *Id.* art. 30. The purpose of these provisions is illustrated by the standard imposed on the relevant advertising. The advertising must provide necessary information in order for consumers to understand adequately the terms or conditions of the promotion, as well as the manner in which to obtain its fulfillment. *Id.*

⁹¹ SENATE PROPOSAL, *supra* note 9, art. 27.

⁹² *Id.* art. 28.

⁹³ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, arts. 12-14

⁹⁴ *Id.* art. 13.

⁹⁵ *Id.*

⁹⁶ *Id.* art. 14

product fails to meet specifications agreed to by the parties to the contract.⁹⁷

The first circumstance permits the consumer to enforce mandatory safety and quality standards by exercising the choice provided for in the statute; the second circumstance enforces the obligation of the provider to label the product accurately. In these instances, the consumer's options reinforce existing legal obligations of the provider. The third circumstance seems most like the warranty of merchantability. Specifically, the product must be adequate for the purpose for which it is normally used. The use of "designation" suggests that the provider may play a somewhat larger role in determining the ordinary uses of the product. The fourth circumstance gives consumer statutory remedies for what is basically a breach of the contract by the provider.

The Senate version adds three additional circumstances in which the consumer could exercise the options described above.⁹⁸ One of these applies if the deficiency that makes the product not appropriate for the "normal use for which it was intended" persists despite attempts to honor the warranty or provide technical service.⁹⁹ The second appears to incorporate the civil law concept of redhibitory vice.¹⁰⁰ If a hidden defect renders it impossible for a product to be used as normally intended or diminishes its utility to the extent that a purchaser aware of the circumstances would not have purchased it for the price at which it was offered, the consumer options for redress apply.¹⁰¹ The third repeats a specific type of express guarantee also contained in several other South

⁹⁷ *Id.*

⁹⁸ SENATE PROPOSAL, *supra* note 9, art. 16(e)-(g).

⁹⁹ *Id.* art. 16(e).

¹⁰⁰ Redhibitory vice is a concept from the civil law of implied warranty. It allows the avoidance of a sale because of a defect in the product in instances where, had the buyer been aware of the defect, the buyer would not have purchased it. *See generally* Robert L. Hersberger, *Quality Expectations*, 49 LA. L. REV. 315, 316 (1988) (noting Louisiana faithfully follows the civil law concept of redhibition); George L. Bilbe, *Redhibition and Implied Warranties under the 1993 Revision of the Louisiana Law of Sales*, 54 LA. L. REV. 125, 126 (1993) (discussing the definition of redhibition under the revised code).

¹⁰¹ SENATE PROPOSAL, *supra* note 9, art. 16(f).

Américan consumer protection laws.¹⁰² If the metal content of gold or silver works, jewelry, or other items is inferior to what is indicated on them, the consumer may seek redress.¹⁰³

The consumer may seek the remedies provided against the seller, manufacturer, or importer.¹⁰⁴ These parties may seek indemnification of the amount paid to the consumer or of the cost of a return, repair or replacement whenever the defect that gave rise to the consumer claim "is imputable to one or the other."¹⁰⁵ When monetary restitution is required, the statute provides a mechanism for adjusting the amount owed for inflation.¹⁰⁶

Under the provision, consumer remedies are limited. Any claim must be made within three months following the date on which the product was received.¹⁰⁷ This time period essentially limits the warranty imposed by the proposal to a period of three months. That this limitation is intended is also suggested by the statute's direction that a specific guarantee may extend this period, leaving more extensive warranties to the agreement of the parties.¹⁰⁸ If the product is one sold for immediate consumption, any claim must be made within one month.¹⁰⁹ The Senate version permits the period for immediate consumption products to be that printed on the product or wrapper.¹¹⁰ If none is provided, a claim must be made within seven days.¹¹¹

In addition, the consumer must prove the act of sale or the contract "with the appropriate documentation."¹¹² Any tests

¹⁰² See generally Vaughn, *supra* note 10, at 304.

¹⁰³ SENATE PROPOSAL, *supra* note 9, art. 16(g).

¹⁰⁴ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 15. These remedies apply as long as the product has not fallen into such disrepair through neglect on the part of the consumer. *Id.*

¹⁰⁵ *Id.* art. 16.

¹⁰⁶ *Id.* art. 21. The amount is adjusted according to the Consumer Price Index prepared by the National Institute of Statistics. *Id.* The relevant period of adjustment is between the month prior to date in which the infraction occurred and that in which restitution is made effective. *Id.*

¹⁰⁷ *Id.* art. 15.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ SENATE PROPOSAL, *supra* note 9, art. 17.

¹¹¹ *Id.*

¹¹² HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 15.

regarding specifications must be carried out under the relevant standards for testing.¹¹³

The Senate version adds provisions and modifies others regarding these consumer remedies. This version removes the provision regarding indemnification; instead, it adds a provision that permits action against an importer or manufacturer if the vendor can not be reached for redress.¹¹⁴ It also deletes the section addressing quality tests or specifications. The Senate version adds one moderately helpful provision and one potentially very burdensome to the consumer. The three-month period in which a claim must be made is suspended during the period that the good is being repaired under its guarantee.¹¹⁵ However, if the provider of the good has given the guarantee, the consumer may not exercise the redress options described above until the consumer has exhausted attempts to have the grantor of the guarantee satisfy its terms.¹¹⁶ For practical purposes this means that the provider can set the initial remedy to be provided, such as repair, thereby effectively eliminating the other options provided in the statute. In addition, any provider who through negligence causes injury to the consumer because of deficiencies in the product violates the statute and may be subject to penalties provided by the statute.¹¹⁷

E. Services

In the repair of products, the provider of a service will use new and adequate components or parts for the product unless the consumer has specifically agreed otherwise in writing.¹¹⁸ Apart from other sanctions that apply to a violation of this obligation, the service provider is obligated, without charge, to substitute the

¹¹³ *Id.* art. 17. The provision assumes official testing standards applicable to many products. If no such official standards exist, the rules of the respective science, technique or art will be applied. *Id.*

¹¹⁴ SENATE PROPOSAL, *supra* note 9, art. 17.

¹¹⁵ *Id.*

¹¹⁶ *Id.* The provision specifically requires that the consumer make the guarantee effective and exhaust all possibilities offered before relying on the statutory remedies. *Id.*

¹¹⁷ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 18.

¹¹⁸ *Id.* art. 32.

required components or parts.¹¹⁹

If the repair is deficient due to the service provider, the consumer may require that the repair be redone without additional charge.¹²⁰ The consumer must assert this right within thirty days from the delivery of the repaired product or the completion of repairs within the home of the consumer.¹²¹ The consumer must prove the provision of the service or the contract of service "with the respective documentation."¹²² By agreement, the parties may provide a guarantee with a longer term within which the consumer may require that the repair be redone.¹²³

If the provider is an intermediary between the one who performs the service and the consumer, the contract must be in writing stipulating the characteristics including the conditions, price, and form of payment.¹²⁴ The provider is liable to the consumer for failure to meet the terms of the contract but may lodge a claim against the one who performs the service or a third party that is responsible for the deficiencies in the service.¹²⁵

The Senate version permits the provider of a service, including the provider of a repair service, to determine the period for which the provider will be responsible for the service or repair.¹²⁶ The Senate version emphasizes that the provider determines the duration of the guarantee of any service by deleting the provision that gave consumers a right to have the repair redone if a deficiency arose within thirty days.¹²⁷ A provision is added that

¹¹⁹ *Id.*

¹²⁰ *Id.* art. 33.

¹²¹ *Id.* The provision also requires that this subsequent repair be done expeditiously, in the period of time strictly necessary. *Id.*

¹²² *Id.*

¹²³ *Id.* As with many other provisions of the proposal much of the detail as well as the scope of protection is left to the agreement of the parties.

¹²⁴ *Id.* art 34.

¹²⁵ *Id.* This provision protects the interests of consumers to seek redress from the provider and prevents the provider from legally delegating responsibilities owed to the consumer.

¹²⁶ SENATE PROPOSAL, *supra* note 9, art. 32.

¹²⁷ *Id.* arts. 23-34. Like the House of Deputies Proposal, the Senate Proposal relies heavily upon the agreement of the parties to fix the terms and character of guarantees. Unlike the House of Deputies Proposal, the Senate Proposal does not provide any minimum standard against which the negotiation of the parties must take place.

gives the provider of a repair service any item left for repair if not claimed within one year from the date of the receipt or authorization of work.¹²⁸

The statute gives consumers the right to enforce its provisions without losing causes of action provided by other legislation regulating public sanitation services, transportation, telephone, and the distribution of electric energy and gas.¹²⁹ This provision seems analogous to the regulation of public utility services addressed by other consumer statutes in South America.¹³⁰ The Senate version deletes this provision.

A provider may not cancel or suspend a service that parties have contracted for and payment has been made regarding the right of connection, installation, inclusion, or maintenance. The provider is subject to penalties provided in the statute.¹³¹

F. Dangerous Goods and Services

The providers of dangerous goods must give necessary warnings as part of the product or in attached instructions to ensure that use of the product is as safe as possible.¹³² Providers of dangerous services have a similar obligation to inform the user, or those who may be affected by the use, of the safest way to use or incorporate the service.¹³³ A product or service is dangerous if the dangers posed by it are widely known or if the dangers arise from the nature of the product or service.¹³⁴

Providers of goods or services who discover a product or service risk after its introduction into the market must inform the appropriate authority of that information "without delay."¹³⁵ The

¹²⁸ *Id.* art. 33.

¹²⁹ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 35.

¹³⁰ *E.g.*, External Circular No. 005 of March 23, 1993, under Decree No. 3466 of Dec. 2, 1982, of the President of Colombia.

¹³¹ SENATE PROPOSAL, *supra* note 9, art. 31.

¹³² HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 38.

¹³³ *Id.*

¹³⁴ *Id.* The general principle regarding goods and services is that they should be free of risks to the health or safety of consumers except for those risks that are normal and foreseeable at the time of use. These normal and foreseeable risks can be defined by regulation. *Id.* art. 37.

¹³⁵ *Id.* art. 39. In the proposal the appropriate agency is the National Consumer

appropriate authority will then decide whether to notify the public regarding the risk. Any notification by that authority should occur as soon as possible.¹³⁶ In addition, the appropriate agency may require the product or service provider to disseminate the information.¹³⁷

The Senate version eliminates the entire chapter of the proposed statute addressing dangerous products and services.¹³⁸ Therefore, none of the requirements or protections contained in this chapter would apply under that version.

G. Enforcement

The statute provides both administrative and judicial enforcement. Despite the powers granted to administrative bodies, enforcement of most violations rests with the courts. This approach varies from that of some other South American countries where administrative agencies conduct individual enforcement actions.¹³⁹

The Ministry of Economy, Development and Reconstruction has important regulatory authority for establishing standards regarding the labeling of products and the display and advertising of the prices of products and services.¹⁴⁰ In addition, the ministry may enforce requirements that the provider give the consumer information, including written instructions, regarding the use of the products and the risks posed by them.¹⁴¹ The ministry may establish standards and procedures to enforce the guarantee provided to consumers by the providers of products and services.¹⁴² In the areas of product information regarding risks, uses, and

Service of Chile. *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* The National Consumer Service may also determine the terms and nature of the dissemination of the product information. *Id.*

¹³⁸ See SENATE PROPOSAL, *supra* note 9, arts. 23-34.

¹³⁹ Vaughn, *supra* note 10, at 312-13. For example, the Venezuelan consumer protection statute established an administrative body with broad powers and considerable independence. See *id.* These powers included investigation, regulation, administrative adjudication, the commencement of judicial actions, information gathering, and education. See *id.*

¹⁴⁰ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art 50(a)-(b).

¹⁴¹ *Id.* art 50(c).

¹⁴² *Id.* art 50(d).

guarantees; the statute envisages some type of administrative enforcement

The National Consumer's Service (SERNAC) is located within the Ministry of Economy, Development and Reconstruction but connected with the President of the Republic of Chile.¹⁴³ The Service acts as a coordinating body for other government agencies, as a collector and disseminator of information regarding consumer products, as a testing agency, and as a representative of consumers.¹⁴⁴ The Service is authorized to seek the cooperation of other governmental bodies in carrying out its functions; these bodies are obligated to report violations of law to the consumer service.¹⁴⁵

The Service collects data from providers, who are obligated to provide the commercial information regarding products and services to the Service.¹⁴⁶ In addition, the Service may create laboratories or other bodies to analyze consumer products and carry out studies and investigations of the market.¹⁴⁷ The Service may conclude technical agreements with national and international agencies to fulfill its mission.¹⁴⁸ As a source of information, the Service disseminates information to consumers and gives advice regarding products and services. The Service may bring actions

¹⁴³ *Id.* art. 51.

¹⁴⁴ *Id.* arts. 52-54.

¹⁴⁵ *Id.* art. 52.

¹⁴⁶ *Id.* art. 53. The information gathering powers of the Consumer Service are central to the accomplishment of its mission. This information permits the Service to address problems confronting consumers, to direct regulatory resources, to understand relevant industries and products, and to provide consumers with information and education regarding products and services. Indeed, the information gathering and dissemination functions of regulatory agencies are at least as important as their adjudicatory and rulemaking powers. With the development of electronic technologies, government agencies can serve as information clearinghouses empowering consumers in the market for products and services.

The House of Deputies Proposal emphasizes the information gathering and dissemination functions of the Service and the importance of informed consumers in a market economy. Among the functions specifically set out for the Service are development of programs of orientation and education of consumers, giving consumers information about products and markets, understanding and conveying patterns of consumption to consumers, and advising consumers and providers in matters with the expertise of the service. *Id.* art. 54(a), (c), (f).

¹⁴⁷ *Id.* art. 54(b), (d).

¹⁴⁸ *Id.* art. 56(d).

before the courts for violation of the statute and take part in actions brought by consumers.¹⁴⁹ The Service's enforcement authority rests on its ability to bring actions before the courts. The statute organizes the Service at a national and regional level.¹⁵⁰ An endowment and operating fund is created for the Service.¹⁵¹

The Senate version removes the entire title of the law addressing the structure, powers, and procedures of the regulatory body.¹⁵² The National Consumer Service is left with the authority to receive consumer complaints and inform the provider "with the goal of reaching voluntary alternatives" found to be "agreeable."¹⁵³ As noted below, the National Consumer Service may intervene in some judicial proceedings and commence those proceedings in some instances.¹⁵⁴ The Senate version therefore eliminates the regulatory powers and responsibilities discussed above.

The courts are given important, if not principal, responsibility for the resolution of individual disputes. Actions are brought before local magistrates; these magistrates may submit all of the actions, except those concerning dangerous products or services, to a court of conciliation.¹⁵⁵ A hearing, which the provider must attend, is conducted by the court with the aim of conciliation of the parties.¹⁵⁶ Compliance of the provider with any conciliation agreement extinguishes any rights the consumer would have to commence additional action for the violation of the statute involved in the conciliation.¹⁵⁷ The Senate version deletes the entire title dealing with the court of conciliation.¹⁵⁸ The National

¹⁴⁹ *Id.* art. 56(b).

¹⁵⁰ *Id.* arts. 51, 55-56.

¹⁵¹ *Id.* art. 57. These sources of support include property transferred to the consumer service, annual appropriations for the service, contributions received for "international cooperation," inheritances, bequests and donations from nonprofit entities (those regulated by the law may not make such bequests and donations), and the income and interest from property and assets of the service. *Id.*

¹⁵² SENATE PROPOSAL, *supra* note 9, arts. 41-44.

¹⁵³ *Id.* art. 35. This power is treated as an adjunct to the judicial resolution of cases.

¹⁵⁴ *Id.* art. 39.

¹⁵⁵ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 43.

¹⁵⁶ *Id.* art. 44.

¹⁵⁷ *Id.* art. 45.

¹⁵⁸ SENATE PROPOSAL, *supra* note 9, arts. 41-44.

Consumer Service has some limited powers to attempt conciliation between consumers filing complaints and providers of goods and services.¹⁵⁹

The local magistrate has jurisdiction over any action brought by the consumer.¹⁶⁰ The House of Deputies proposal addresses some aspects of the procedure in these cases.¹⁶¹ These aspects, including the privilege of proceeding in form analogous to in forma pauperis, suggest that the courts are to accommodate the consumer.¹⁶² The Senate version deletes these procedural aspects including the privilege of proceeding in form analogous to in forma pauperis.¹⁶³

The proposal provides fines for violation of the provisions relating to dangerous products or services, and for violation of the prohibitions on advertising if these occur in mass media.¹⁶⁴ Of course, under the Senate version, the fines for provisions related to dangerous products have been eliminated because the substantive provisions regarding dangerous products have been deleted.¹⁶⁵ The court may impose additional fines or fines in any case in which the accused acted "recklessly or maliciously."¹⁶⁶ Fines in these instances must not be less than ten percent of the quantity of the dispute.¹⁶⁷ In addition, the court can order the confiscation of products or services that are the subject of the violation¹⁶⁸ and can, in appropriately serious cases, direct an advertiser to issue corrective advertising at the advertiser's expense to address errors or falsehoods in the original advertising.¹⁶⁹ The provisions giving

¹⁵⁹ *Id.* art. 39.

¹⁶⁰ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 46. The local magistrate of the community in which the accused has his domicile has jurisdiction over the action. *Id.* If the accused is domiciled in different communities, the accuser may choose to bring the action in any of these jurisdictions. *Id.*

¹⁶¹ *Id.* art. 47.

¹⁶² *Id.* art. 48. Consumers will "enjoy" the "privilege" of poverty. *Id.*

¹⁶³ SENATE PROPOSAL, *supra* note 9, arts. 35-40.

¹⁶⁴ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 19. These fines are paid to the public treasury rather than to the injured consumer. *Id.*

¹⁶⁵ See discussion *supra* note 114.

¹⁶⁶ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art. 48.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* art. 47(f).

¹⁶⁹ *Id.* art. 49.

judges the power to seize products or to order corrective advertising are not found in the Senate version. Generally, the possible amounts of remaining fines have been reduced by the Senate version.¹⁷⁰ The Senate version provides that in cases of repetition of violations that the court may double the applicable fine.¹⁷¹ However, repetition is defined as having been sanctioned for violations of this law "two or more times" within "the same calendar year."¹⁷²

The Senate version also addresses the powers of consumer organizations that might be formed to pursue consumer rights. These organizations are not given power to represent consumer interests in courts or before administrative agencies.¹⁷³ Such organizations "may only" create awareness about the law, educate consumers regarding their rights, provide advice, propose methods of enforcement, and promote dialogue with providers and their representative organizations about improvement in products and in the market.¹⁷⁴

The Senate version also places some limitation on consumer organizations, most of which seem designed to ensure that these groups remain representative of consumers. At least one, however, might be construed to restrict the ability of consumer groups to fund their activities and would deny consumer groups the ability to participate in activities, such as the commercial publication of magazines like *Consumer Reports*. The limitations, that appear to protect the representative character of the organizations include prohibitions against affiliating with entities dedicated to business activities, against receiving aid or subsidies from companies that supply goods or services to consumers, and against carrying advertising or disseminating communications that do not report solely on products and services.¹⁷⁵ The prohibition against "lucrative" activities is unclear; to the extent that it prohibits consumer associations from becoming involved in the

¹⁷⁰ Compare *Id.* art 19 with SENATE PROPOSAL, *supra* note 9, art. 19.

¹⁷¹ SENATE PROPOSAL, *supra* note 9, art. 19.

¹⁷² *Id.*

¹⁷³ See *id.* art. 5.

¹⁷⁴ *Id.* art. 5(a)-(d).

¹⁷⁵ *Id.* art. 6(b)-(d).

sale of goods or services, it fits with the other limitations.¹⁷⁶ If "lucrative" means any money-making activity, the restriction is a significant one that could affect the viability of consumer organizations.

III. Evaluation of the Proposals

Evaluation of the Chilean proposals rests on the U.N. Guidelines, the regional standards emerging from recently enacted consumer laws in South America and the laws of the NAFTA members. The first and most general of these standards consists of the United Nations Guidelines. The U.N. Guidelines provide a framework into which to place the Chilean proposals and the regional standards. In some instances, the deficiencies in the Chilean proposals are clearly evident in light of the U.N. Guidelines. In other instances, the regional standards suggest more specific inadequacies.

The General Assembly of the United Nations adopted the United Nations Consumer Protection Guidelines in 1985.¹⁷⁷ These Guidelines address the physical safety of consumers, the promotion and protection of their economic interests, standards for the safety and quality of consumer goods, distribution facilities for essential goods, provisions for judicial or administrative relief, and education and information processes.¹⁷⁸ In addition, the Guidelines urge international cooperation, particularly through regional agreements.¹⁷⁹

The U.N. Guidelines do not establish any binding international standards. Although businesses must follow the laws of the nations in which they do business, the Guidelines do not create any international standards.¹⁸⁰ Despite these limitations, the Guidelines have had considerable influence and they have become accepted as appropriate, although not binding, principles of consumer protection.

The regional standards are created by the recently enacted

¹⁷⁶ *Id.* art. 6(a).

¹⁷⁷ G.A. Res. 248, *supra* note 24.

¹⁷⁸ These topics form the major subsections of the United Nations Guidelines.

¹⁷⁹ G.A. Res. 248, *supra* note 24, at 181.

¹⁸⁰ *Id.* at 180.

consumer protection statutes of South America and the consumer protection statutes of NAFTA members. Because these standards are the result of the combining several provisions, it is important to compare and contrast them. In South America where the statutes show both considerable correspondence and divergence, the evaluation focuses on the most extensive statutory provisions. Typically these are Brazil, Argentina, and Venezuela.

Several of the guidelines apply to the Chilean proposals. Because the guidelines set general rather than specific standards, they are more difficult to apply but for that reason are perhaps more useful.

Several of the guidelines concern restrictions on credit terms and on contractual provisions as well as provisions for consumer access to accurate information sufficient to permit meaningful consumer choice. Application of these particular principles reveals deficiencies in the Chilean proposals.

A. Protection from "unconscionable conditions of credit by sellers"

1. U.N. Guidelines

A guideline that address the protection of the economic interests of consumers states that consumers should be protected against "unconscionable conditions of credit by sellers."¹⁸¹ The guideline emphasizes regulation that might prohibit particular types of contractual provisions. Because the guideline is included as a part with several others that emphasize consumer access to information,¹⁸² it is appropriately read as incorporating this concern for adequate consumer information regarding credit terms.

Specific proposals in Chile address the disclosure of credit information. The proposal of the House of Deputies requires the disclosure of information regarding credit.¹⁸³ The information

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ HOUSE OF DEPUTIES PROPOSAL, *supra* note 8, art.31. The information required includes the price of the good or service, the existing monthly rate of interest and the rate of interest for delayed payment, the amount of additional payments that may be collected by law, and the number and period of payments. G.A. Res. 248, *supra* note 24, at 180.

provided permits consumers to evaluate the credit terms and discourages unconscionable conditions which are the focus of the U.N. Guidelines.

2. *South American Statutes*

Several important pieces of information, however, are missing under the Chilean provisions. These include the total price of the good or service after interest is calculated, the expression of interest in a uniform way, the expression of the effective interest over the life of the contract, and the provision of any penalties associated with an attempt to prepay the debt. This type of information is required in other South American statutes.¹⁸⁴ For example, the Brazilian statute mandates product or service price disclosure in Brazilian currency, the default and actual interest rate, surcharges permitted by law, the number and interval of installments, the total price both financed and unfinanced, and any other charges to be included.¹⁸⁵ In addition, Brazil requires that the consumer be informed of the right to early liquidation of the debt provided by the law with the proportional reduction in interest that would accompany the early liquidation.¹⁸⁶

Additionally, the consumer law of Argentina imposes similar information requirements. In Argentina, the failure to comply with the information requirements results in nullification of the credit agreement. The law also charges the Central Bank of Argentina with enforcement of the provisions as to entities subject to its regulation.¹⁸⁷ Although Venezuela does not impose specific

¹⁸⁴ Model Legislation proposed by Consumers International illustrates the character of the provisions in South America. Model Consumer Protection Legislation, ch. III (Informal Working Group of Legal Issues of the IOCU Regional Office for Latin America and the Caribbean, Nov. 1988). The model legislation requires that the seller inform the consumer of the cash price of the product, the amount of interest, the effective rate (including any increase in the rate due to delay in payment), the number of payments and their interval, and the total price of the good. *Id.* para. 18. The legislation also gives the consumer the right to prepay the amount owed with a proportional reduction in interest. *Id.* para 19.

¹⁸⁵ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZIL CONSUMER PROTECTION CODE], Lei No. 8.078, de 11 de setembro de 1990, art. 52, *translated in* JAFFE & VAUGHN, *supra* note 51, at 119 (Braz.).

¹⁸⁶ *Id.*

¹⁸⁷ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Law No. 24.240, Oct. 15, 1993, art. 36, *translated in* JAFFE & VAUGHN, *supra* note 51, at 41-43 (Arg.). The

information requirements, it does prohibit usurious rates of interest in credit sales.¹⁸⁸ Peru follows the model of Brazil and Argentina requires the disclosure of information not included within the Chilean proposals—the total price of the good after financing, expression of interest in a uniform way, the expression of interest over the life of the contract and information regarding consumer early liquidation of the debt.¹⁸⁹

If the Chilean proposals are to comply with the U.N. Guidelines, there must be sufficient information to permit the consumer to avoid unconscionable contract terms. The exclusion of several types of information, important to consumer choice, casts doubt on the adequacy of the Chilean proposals.

Because the guidelines impose an obligation to protect consumers from unconscionable terms, more official action than providing credit information may be required to protect the consumer. For example, the statute of Brazil specifically defines the rights of consumers regarding missed payments or prepayment.¹⁹⁰ In addition, the Brazilian statute addresses consumer access to credit information and regulates the collection, maintenance and use of consumer credit information.¹⁹¹

In sum, although the Chilean proposals arguably comply with the U.N. Guidelines, they are deficient when compared with the standards arising from the South American statutes. The Chilean proposals do not require the disclosure of important credit information required in other statutes. These deficiencies highlight weaknesses in the Chilean proposals and raise doubts as to the extent of compliance with the Guidelines. In addition, other

information that must be disclosed includes the cash price, the balance owed, the total of interest payments, the form of the amortization of interest, any other pertinent costs, the number and period of the payments, any additional charges, and the total financed amount to be paid. *Id.*

¹⁸⁸ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 62(3), *translated in* JAFFE & VAUGHN, *supra* note 51, at 585 (Venez.).

¹⁸⁹ PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATED NORM REGARDING CONSUMER DEFENSE], Decreto No. 716, de 9 de noviembre de 1991, art. 24, *translated in* JAFFE & VAUGHN, *supra* note 51, at 479 (Peru).

¹⁹⁰ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZIL CONSUMER PROTECTION CODE], Lei No. 8.078, de 11 de setembro de 1990, art. 52, para. 2, *translated in* JAFFE & VAUGHN, *supra* note 51, at 119 (Braz.).

¹⁹¹ *Id.* art. 43, *translated in* JAFFE & VAUGHN, *supra* note 51, at 113-14 (Braz.).

statutes move beyond mere informational requirements to protect consumers. For example, the Brazilian and Peruvian provisions address prepayment, and Brazil regulates billing and collection practices as well as the collection of credit information.

3. *North American Standards*

A review of the North American provisions regulating credit information also demonstrates some weaknesses in the Chilean proposals. The laws of the United States and Canada, like those of Brazil, address a number of protections beyond credit information including credit reporting and equal access to credit. Consumer provisions in the United States can be found in federal and state statutes as well as local government provisions addressing similar problems and issues. Although a number of statutes address consumer credit, the Uniform Consumer Credit Code¹⁹² and the Federal Truth in Lending Act¹⁹³ assume competition in the credit market, and like many of the South American statutes, seek to provide consumers with sufficient information to choose between sources of credit. Both the Uniform Consumer Credit Act and the Federal Truth in Lending Act emphasize disclosure of consumer information regarding effective or percentage rates of interest. The UCCA addresses the right to prepay, the regulation of credit charges as well as collection practices.¹⁹⁴ Under the Federal Truth in Lending Act disclosure includes finance charges, annual percentage rate of interest, the existence of balloon payments and requirements for periodic billing.¹⁹⁵ In addition to disclosure, these provisions regulate creditor practices and remedies.¹⁹⁶ U.S. provisions are "directed at trying to insure that the consumer fully understands the transaction."¹⁹⁷ Techniques used to achieve this

¹⁹² UNIF. CONSUMER CREDIT CODE, 74 U.L.A. 1 (1974).

¹⁹³ TRUTH IN LENDING ACT, 15 U.S.C. § 1601 et seq. (1968). For a review of contemporary issues in truth in lending see generally Chris Dawes, *Overview of Recent Developments in Truth in Lending*, 48 CONSUMER FIN. L.Q. REP. 450 (1994).

¹⁹⁴ For a discussion of the Uniform Consumer Credit Code see generally DONALD ROTHCHILD & DAVID CARROLL, CONSUMER PROTECTION, ch. 19 (1973).

¹⁹⁵ See generally *id.* ch. 13.

¹⁹⁶ See generally *id.* chs. 13, 19.

¹⁹⁷ Griffith L. Garwood, *Credit and Financial Services in Global Trends of Consumer Laws in A Changing World* (Paper from the Japan Seminar on Consumer Affairs 2-4 Aug. 1994) at 257. Garwood lists and briefly describes a range of provisions

goal include requiring print of a particular size, warning notices, inclusion of specific calculation methods for interest rates, prominent placement of required information, and "plain English" requirements.¹⁹⁸

Similarly, Canadian law recognizes the importance of consumer information regarding credit and of fair and equitable terms of credit.¹⁹⁹ Both the federal government and the provinces require disclosure of credit information in advertising and credit contracts.²⁰⁰ "Legislation applies to vendor and lender credit but only some provinces include consumer leases within the scope of legislation."²⁰¹ Canadian law also invalidates credit contracts that do not include appropriate disclosures, such as the cost of credit.²⁰² Further, consumers generally have the right to prepay loans.²⁰³ In addition, provisions impose cooling off periods, equal access to credit, restrictions on information that can be disclosed by credit reporting companies and give consumers a right to review their credit reports.²⁰⁴

Commentators of both U.S. and Canadian law note the importance of access to credit and the particular problems of low income consumers of credit.²⁰⁵ Although the Chilean proposals focus on the provision of information, they do not address issues

regulating consumer credit in the United States, including the Community Reinvestment Act, Consumer Leasing Act, Electronic Fund Transfer Act, Equal Credit Opportunity Act, Expedited Funds Availability Act, Fair Credit Billing Act, Fair Credit and Charge Card Disclosure Act, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Fair Housing Act, Flood Disaster Protection Act, FTC Improvement Act, Home Equity Loan Consumer Protection Act, Home Mortgage Disclosure Act, Real Estate Settlement Procedures Act, Right to Financial Privacy, Truth in Lending Act, Truth in Savings Act, and the Women's Business Ownership Act. *Id.* (citations to statutes omitted).

¹⁹⁸ *Id.* at 257.

¹⁹⁹ Iain Ramsey, *Consumer Credit Law: Canada in Global Trends of Consumer Laws in A Changing World* (Paper from the Japan Seminar on Consumer Affairs 2-4 Aug. 1994) at 251.

²⁰⁰ *Id.* at 252-53.

²⁰¹ *Id.* at 253.

²⁰² *Id.* One province "renders the contract non-binding" although the consumer may have "to pay a reasonable price for benefits received." *Id.* (citation omitted). Other provinces limit "the creditor to the cash price less any payments made." *Id.* (citation omitted).

²⁰³ *Id.* at 254. "There is a general right to prepay credit contracts and the Rule of 78 is used . . . in several provinces [to] calculate the balance owing." *Id.*

²⁰⁴ *Id.* at 253.

²⁰⁵ See Garwood, *supra* notes 197-98; Ramsey, *supra* note 199.

regarding the protection of consumers provided by the more extensive statutory provisions in North America.

The Mexican Consumer Protection Act of 1975 was in part "inspired by" the Uniform Consumer Credit Code.²⁰⁶ One of the basic principles of the 1975 Act was that "public authorities should have the power to establish the maximum interest rates, and additional charges imposed on the consumer as well as the authority to ensure that additional charges and interest are not incorporated into the price."²⁰⁷ The Act requires "full disclosure" of credit terms.²⁰⁸ The recent Federal Consumer Protection Law emphasizes that the consumer must be informed of the difference in credit and cash prices of goods and services, and must provide the consumer with monthly statements during the life of the credit contract.²⁰⁹ Some of this information, including the differences in credit and cash prices of goods, is not incorporated into the Chilean proposals.

The North American provisions evidence broader regulation of consumer credit than the proposals pending in Chile. Further, the North American provisions impose more expansive disclosure requirements and regulation of creditor practices.

In sum, although the Chilean proposals arguably comply with the U.N. Guidelines, they are deficient when compared with the standards arising from the South and North American statutes. These deficiencies highlight weaknesses in the Chilean proposals and raise doubts about the extent of compliance with the Guidelines.

B. "Access to adequate and accurate information"

1. U.N. Guidelines

The U.N. Guidelines list as a legitimate consumer interest the "[a]ccess of consumers to adequate information to enable them to make informed choices according to individual wishes and

²⁰⁶ Vargas, *supra* note 23, at 345.

²⁰⁷ *Id.* at 365-66 (citation to statute omitted).

²⁰⁸ *Id.* at 365 (citation to statute omitted).

²⁰⁹ L.F.P.C., art. 66 I (Mex.).

needs.”²¹⁰ Although not stated as a specific guideline, this principle justifies several specific guidelines. For example, “[fair consumer practices require] the provision of information necessary to enable consumers to make informed and independent decisions, as well as measures to ensure that the information provided is accurate.”²¹¹ “Governments should encourage all concerned to participate in the free flow of accurate information on all aspects of consumer products.”²¹²

The Chilean proposals address product information in a variety of ways, including the disclosure of price information, weights and measures, instructions, and the product labeling requirements.²¹³ The proposals specifically regulate advertising and impose limited requirements for advertising claim substantiation.²¹⁴ The disclosure of product risks and warnings, although relevant here, fits best with the subsequent discussion of product quality and safety.²¹⁵

The Chilean proposals require the disclosure of very little product information. Advertising accuracy is only weakly regulated.²¹⁶ The paucity of information required and the character of the regulation of advertising, permit an assessment that the information provided is not “adequate” to allow informed choice and that a considerable risk exists that at least some of the information provided to consumers may not be accurate.

2. South American Statutes

An examination of how the other South American statutes address consumer information supports this assessment of the Chilean proposals. In terms of price information, other statutes attempt to limit any confusion regarding price. For example, Venezuela requires that only one price appear on a product²¹⁷ and

²¹⁰ G.A. Res. 248, *supra* note 24, at 179.

²¹¹ *Id.* at 180.

²¹² *Id.*

²¹³ See discussion *supra* notes 64-75 and accompanying text.

²¹⁴ See discussion *supra* notes 76-92 and accompanying text.

²¹⁵ See discussion *infra* notes 282-312 and accompanying text.

²¹⁶ See discussion *supra* notes 76-92 and accompanying text.

²¹⁷ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No.

other statutes take steps to ensure that any advertised price reduction will be legitimate by requiring that the non-sale price of the good also be provided.²¹⁸ Venezuela also require information, ranging from price, weight, characteristics, terms of the sales agreement, date of delivery, identity of provider, useful life, expiration date, warning and instructions regarding use and maintenance to appear in a document accompanying the product.²¹⁹ Brazil dictates that the offeror of products or services clearly and accurately describes the quality, quantity, composition, price, warranty, origin, validity and any health or safety risks.²²⁰ Argentina imposes similar obligations on the seller of a product.²²¹

Generally, the South American statutes attach considerable importance to advertising regulation. Advertising is assumed to be an important source of consumer information and a powerful influence on consumer decision making. Advertising is broadly defined and the statutes prohibit a variety of false and misleading advertising.²²² For example, Argentina equates advertising with announcements, prospectuses, circulars or other means of dissemination.²²³ Additionally, the Brazilian statute implies an

4.403, de 20 de febrero de 1992, art. 18, *translated in* JAFFE & VAUGHN, *supra* note 51, at 568 (Venez.).

²¹⁸ *E.g.*, PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 21, *translated in* JAFFE & VAUGHN, *supra* note 51, at 478 (Peru).

²¹⁹ *E.g.*, LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 febrero de 1992, art. 2(2), *translated in* JAFFE & VAUGHN, *supra* note 51, at 560 (Venez.).

²²⁰ CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 31, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

²²¹ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 10, *translated in* JAFFE & VAUGHN, *supra* note 51, at 29-30 (Arg.). The seller must provide a description and specification of the good, the name and domicile of the vendor, the nature of any guarantees, the period and conditions of delivery, and the price and conditions of payment. More generally, all sellers in the chain of distribution and sales must furnish consumers or users in clear and objective form, truthful, detailed, effective and sufficient information regarding the essential characteristics of the good or service. *Id.* art. 4.

²²² *E.g.*, *Id.* art. 8, *translated in* JAFFE & VAUGHN, *supra* note 51, at 28 (Arg.); CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

²²³ NORMAS DE PROTECCION Y DEFENSA DE LOS CONSUMIDORES [NORMS OF PROTECTION AND DEFENSE OF THE CONSUMER], Ley 24.240, de 22 de setembro de 1993,

equally broad definition of advertising²²⁴ and in Venezuela, advertising is defined as the mass dissemination or restriction of messages regarding products and services.²²⁵

As noted below, advertising is used to convey product risks and warnings. Other statutes often limit specific types of advertising. For example, Venezuela regulates advertising regarding alcohol and tobacco²²⁶ and Brazil prohibits discriminatory advertising and advertising that incites violence, exploits fear or superstition, takes advantage of a child's lack of judgment and experience, or that is capable of inducing the consumer to behave in a way that is harmful to the consumer's health or safety.²²⁷

Advertising substantiation requirements can be extensive. For example, Venezuela requires that advertising claims about products be ones that can be verified objectively.²²⁸ The Brazilian statute places on the advertiser an obligation to prove the truthfulness of claims contained in advertising.²²⁹

Under these statutes, consumers may assume the accuracy of product claims contained in advertising. Some statutes, such as those of Argentina and Brazil direct that producers are bound by

art. 8, *translated in* JAFFE & VAUGHN, *supra* note 51, at 28 (Braz.).

²²⁴ CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 36-37, *translated in* JAFFE & VAUGHN, *supra* note 51, at 109-10 (Braz.). These provisions imply a broad definition of advertising because they focus on the content of communication rather than its form, thereby intending to cover all forms in which that content is conveyed.

²²⁵ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 39, *translated in* JAFFE & VAUGHN, *supra* note 51, at 574-75 (Venez.).

²²⁶ *Id.* art. 45, *translated in* Jaffe & Vaughn, *supra* note 51, at 577 (Venez.).

²²⁷ CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 37(2), *translated in* JAFFE & VAUGHN, *supra* note 51, at 110 (Braz.). Ecuador places different general limitations on advertising. LEY DE DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE LAW], Ley No. 520, de 12 de septiembre de 1990, art. 14, *translated in* JAFFE & VAUGHN, *supra* note 51, at 371-72 (Ecuador).

²²⁸ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 40, *translated in* JAFFE & VAUGHN, *supra* note 51, at 575-76 (Venez.).

²²⁹ CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 38, *translated in* JAFFE & VAUGHN, *supra* note 51, at 110 (Braz.). In addition, advertisers must retain all factual, technical and scientific data on which their advertising is based. *Id.* art. 36, sole paragraph, *translated in* JAFFE & VAUGHN, *supra* note 51, at 109 (Braz.).

assertions regarding product characteristics made in advertising.²³⁰ In effect, these assertions become part of the contract between buyer and seller. These statutes do not require that the assertions rise to the character of express warranties of the attributes of the product and the consumer does not have to show reliance on the claims of the producer. Therefore, advertising is given direct legal effect by the consumer contract. The legal effect of these statutes on advertising should encourage modesty and accuracy in claims regarding product characteristics.

The Brazilian statute authorizes counter-advertising as a remedy for misleading advertising. The cost of counter-advertising is borne by the advertiser responsible for the misleading advertisement.²³¹ Normally, the counter-advertising must mimic the original misleading advertising in media, place, duration and prominence.²³²

The Chilean proposals require less information than other consumer protection statutes in South America. Additionally, the Chilean proposals impose significantly less restriction on advertising than do other South American provisions. Therefore, the Chilean provisions seem less likely to ensure that consumers possess both adequate and accurate information than comparable regional statutes.

3. North American Standards

The North American provisions impose more significant labeling requirements and regulation of advertising than the Chilean proposals. This section first describes the labeling requirements and then examines the regulation of advertising.

Much of modern consumer legislation in the United States

²³⁰ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 8, *translated in* JAFFE & VAUGHN, *supra* note 51, at 28 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 30, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

²³¹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 60, *translated in* JAFFE & VAUGHN, *supra* note 51, at 125 (Braz.). The burden of persuasion in proving truth and accuracy is on the advertiser. *Id.* art. 38, *translated in* JAFFE & VAUGHN, *supra* note 51, at 110 (Braz.).

²³² *Id.* art. 60(1), *translated in* JAFFE & VAUGHN, *supra* note 51, at 125 (Braz.).

rests upon the principle of informing consumers about the characteristics and use of products. Much of this legislation at both the state and federal level focuses on adequate and accurate labeling of consumer products. For example, the Fair Packaging and Labeling Act²³³ as well as recent efforts at nutritional labeling by the Food and Drug Administration²³⁴ illustrate the importance of labeling. The Fair Packaging and Labeling Act, originally enacted in 1966, emphasizes labeling that permits comparison of value rather than simply price.²³⁵ Labels must include net quantity, specify ingredients in uniform weights and measures, and identify the manufacturer.²³⁶ Moreover, the Act authorizes the regulation of size characterizations, such as small, medium, or large, cents off promotions, ingredients on drugs and cosmetics, and slack fill standards requiring that a certain percentage of a container be filled by the product.²³⁷ In addition, a number of state labeling provisions,²³⁸ to the extent they are not preempted by federal law, as well as the requirements of a number of federal agencies impose specific information requirements.²³⁹

In Canada, The Consumer Packaging and Labeling Act, enacted by the federal government in 1971 "prohibits deceptive

²³³ The Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (1994).

²³⁴ Nutrition Labeling and Education Act Of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified at 21 U.S.C. § 337, 343, 343-1, 345, 371 (1994)).

²³⁵ The Fair Packaging and Labeling Act, 15 U.S.C. § 1454 (1996).

²³⁶ *Id.* § 1454 (c)-(d).

²³⁷ ROTHCHILD & CARROLL, *supra* note 194, at 234.

²³⁸ Craig Jordon, *Preemption and Uniform Enforcement of Food Marketing Regulations*, 49 FOOD & DRUG L. J. 401 (1994) (discussing the federal power to preempt state labeling provisions in order to develop a uniform system of labeling while allowing states the autonomy to establish their own statutes as long as the preempted portions are identical to the federal provisions).

²³⁹ For example, the following provisions that are enforced by the Federal Trade Commission require labeling: Wool Products Labeling Act of 1939, 15 U.S.C. §§ 68-68j (1994); Fur Products Labeling Act, 15 U.S.C. §§ 69-69j (1994); Textile Fiber Products Identification Act, 15 U.S.C. §§ 70-70k (1994); Hobby Protection Act, 15 U.S.C. § 2102 (1994); Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1339 (1994); Fair Packaging Act and Labeling Act, 15 U.S.C. §§ 1451-1461 (1994); Truth in Lending Act, 15 U.S.C. §§ 1601 et seq. (1994); Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (1994); Fair Credit Billing Act, 15 U.S.C. § 1666 (1994); Webb-Pomeroy Act, 15 U.S.C. § 61 et seq. (1994); Fair Debt Collection Practice Act, 15 U.S.C. §§ 1692b-1692o (1994); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1994); Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e (1994); and Electronic Fund Transfer Act, 15 U.S.C. §§ 1693-1693r (1994).

packaging and labeling practices and imposes important disclosure requirements.²⁴⁰

The Mexican Federal Consumer Protection Act of 1975 authorized the government to impose labeling requirements.²⁴¹ All labels must be in Spanish and clear and easy to read.²⁴² Recent Federal Consumer Protection Law emphasizes the importance of labeling requirements and directs that the provider must tell the consumer in writing of any "problem with the product."²⁴³

Likewise the North American provisions significantly regulate advertising to insure its accuracy. In the United States, the Federal Trade Commission insures that advertising is not misleading and that it is accurate.²⁴⁴ Under its advertising substantiation policy, the FTC holds that it is an unfair business practice for an advertiser not to possess and to rely upon material providing a reasonable basis for its claims prior to disseminating them.²⁴⁵ Because objective claims imply that the advertiser has a prior reasonable basis for them, the assertion of these objective claims without prior substantiation is deceptive.²⁴⁶ The "reasonable basis" requirement applies both to the advertiser and the advertising agency.²⁴⁷ One commentator examining the FTC's implementation of the advertising substantiation rule concluded that the rule "has had a significant impact on advertising and advertising regulation" and "has resulted in greater accuracy of advertising claims, ... resulting in more informed consumer decisions" contributing to a more efficient market.²⁴⁸ Advertising may be used as a remedy and certain types of advertising of tobacco and alcohol are

²⁴⁰ JACOB S. ZIEGEL ET AL, SALES TRANSACTIONS 15 (1995).

²⁴¹ Vargas, *supra* note 23, at 364.

²⁴² *Id.*

²⁴³ L.F.P.C., art. 39 (Mex.).

²⁴⁴ See generally, Wallace S. Snyder, *The FTC 1984: Advertising Substantiation Program*, at 119 (PLI Corp. Practice Course Handbook Series No. 467, 1984), available in Westlaw 467 PLI/Corp. 119. The FTC is limited to matters "in" or affecting commerce. 15 U.S.C. §§ 45, 46, 52 (1982).

²⁴⁵ Snyder, *supra* note 244, at 121.

²⁴⁶ *Id.* at 124.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 122.

prohibited.²⁴⁹

In Canada, the federal government prohibits misleading advertising.²⁵⁰ In addition, the British Columbia Trade Practices Act illustrates a provincial regulation of deceptive advertising.²⁵¹ This provision also addresses bait and switch schemes as well as pyramid sales schemes.²⁵² The provisions regarding misleading advertising are quasi criminal in their character and enforced by the federal government. There is also a good deal of pre-clearance of broadcast advertisements carried out by self-regulatory bodies prescribed by the Canadian Radio and Telecommunications Commission.²⁵³

In Mexico, the Federal Consumer Protection Act gave the Federal Attorney General for Consumer Affairs special powers to educate consumers and to insure that any publicity about goods and services be objective, accurate, and truthful.²⁵⁴ Advertisers must provide "truthful and sufficient" information to consumers.²⁵⁵ In fact, the law permits advertisers to seek a type of "advisory opinion" from the Secretariat of Commerce for advance approval of proposed advertising.²⁵⁶ The recent Federal Consumer Protection Act places limitations on the advertising of promotions.²⁵⁷

An examination of the South and North American regional standards highlights gaps in the Chilean proposals. Overall, these proposals fail to ensure that consumers receive sufficient and

²⁴⁹ 15 U.S.C. § 1335 (1994). "[I]t shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication" *Id.*

²⁵⁰ Competition Act, Revised Statutes of Canada. [R.S.C.], ch. 34 (1985) (Can.).

²⁵¹ British Columbia Trade Practices Act, Revised Statutes of British Columbia [R.S.B.C.], ch. 406, § 3 (1979) (Can.).

²⁵² *Id.*

²⁵³ See generally DAVID M. YOUNG & BRIAN R. FRASER, CANADIAN ADVERTISING AND MARKETING LAW (1990).

²⁵⁴ Vargas, *supra* note 23, at 361.

²⁵⁵ *Id.* at 363.

²⁵⁶ *Id.* at 363-64. The advertising is deemed to be approved if the appropriate agency does not act within a specified period. *Id.* at 363.

²⁵⁷ L.F.P.C., art. 47 (Mex.).

accurate information to evaluate products and services.

C. Protection from "contractual abuses"

1. U.N. Guidelines

One U.N. guideline provides that consumers "should be protected from such contractual abuses, as one-sided standard contracts [and] exclusion of essential rights in contracts."²⁵⁸ The House of Deputies proposal would deny validity to adhesion contracts containing certain prohibited clauses.²⁵⁹ The Senate version, of course, would allow the waiver in adhesion contracts of rights conferred by law if the waivers were "explicit" and in "highlighted" form.²⁶⁰

The Senate version seems to conflict directly with the U.N. Guidelines because that version permits the exclusion of essential rights in a one-sided contract. However, the House of Deputies provision seems to fulfill the guidelines.

2. South American Statutes

Although the Chilean proposal from the House of Deputies arguably satisfies the guideline, some South American statutes are more extensive. For example, the Brazilian statute prohibits certain clauses and terms in all consumer contracts rather than only in contracts of adhesion. In addition to specific prohibitions, it contains a general prohibition against inequitable or abusive claims that violate good faith.²⁶¹ Argentina applies similar prohibitions to all sales contracts but imposes special enforcement requirements for adhesion contracts.²⁶² Venezuela, however, limits particular clauses only in contracts of adhesion,²⁶³ although sellers

²⁵⁸ G.A. Res 248, *supra* note 24, at 180.

²⁵⁹ See discussion *supra* notes 52-53 and accompanying text.

²⁶⁰ See discussion *supra* notes 59-60 and accompanying text.

²⁶¹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 51(2), *translated in* JAFFE & VAUGHN, *supra* note 51, at 118 (Braz.).

²⁶² DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 37-38, *translated in* JAFFE & VAUGHN, *supra* note 51, at 42-43 (Arg.).

²⁶³ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No.

are prohibited from imposing some conditions in any contract.²⁶⁴ Moreover, the statutes of Argentina and Brazil contain rules of contract interpretation favorable to the consumer. The broadest of these rules of interpretation is that the contract must be given the interpretation most favorable to the consumer.²⁶⁵

In addition, the Venezuelan statute provides a remedy regarding contracts of adhesion. The Institute for Defense and Education of the Consumer (IDEC), a government agency charged with consumer protection, may examine the clauses of adhesion contracts and, if appropriate, order modification of them.²⁶⁶ This authority permits more systematic enforcement of the prohibitions than provided by the action of individual consumers; this authority also allows a response to improper clauses before individual consumers have been victimized. Moreover, individual consumers might be unwilling or unable to challenge improper clauses. Indeed, many consumers might comply or acquiesce believing the clauses to be valid.

Therefore, the Senate proposal clearly does not comply with the U.N. Guidelines. The proposal of the House of Deputies does. The regional statutes of South America contain more extensive protection of consumers from contracts of adhesion and generally from abusive contract terms.

3. North American Standards

North American countries also seek to limit abusive contractual terms. In the United States, commercial law prohibits "unconscionable" contractual terms.²⁶⁷ Unequal bargaining power

4.403, de 20 de febrero de 1992, art. 15, *translated in* JAFFE & VAUGHN, *supra* note 51, at 566-67 (Venez.).

²⁶⁴ *Id.* arts. 25-30, *translated in* JAFFE & VAUGHN, *supra* note 51, at 570-71 (Venez.).

²⁶⁵ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 37, *translated in* JAFFE & VAUGHN, *supra* note 51, at 45 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 47, *translated in* JAFFE & VAUGHN, *supra* note 51, at 115 (Braz.).

²⁶⁶ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 14, *translated in* JAFFE & VAUGHN, *supra* note 51, at 566 (Venez.).

²⁶⁷ See generally Richard J. Hunter, *Unconscionability Revisited: A Comparative Approach*, 68 N.D. L. REV. 145 (1992) (providing an overview of the concept of

as reflected in contracts of adhesion constitutes an important element in determining whether a particular contractual provision is "unconscionable" and therefore unenforceable.²⁶⁸ Normally a court may refuse to enforce the entire contract, apply the contract with the unconscionable provision, or limit the application of the unconscionable provision.²⁶⁹ Within this context, the United States allows more freedom of contract than some South American provisions. The concept of unconscionability is more flexible than the specific prohibitions of the South American provisions and the legal effect of a determination of unconscionability less clear than the statutory provisions which expressly void either the unconscionable clause or the contract as a whole.²⁷⁰

In Canada, federal law prohibits abusive sales practices such as bait and switch and pyramid sales schemes.²⁷¹ Most provinces have statutes that address misleading practices, including contractual provisions. The British Columbia Trade Practices Act exemplifies these provisions.²⁷² Generally, the British Columbia act prohibits deceiving of misleading practices and specifically proscribes a number of practices.²⁷³ A number of the prohibited practices concern the contract of sale between the consumer and the seller.²⁷⁴ The Act codifies a concept of unconscionability including the use of undue pressure, taking advantage of physical or mental weakness, ignorance, illiteracy or age, gross overcharging and terms so "harsh or adverse" that they are inequitable.²⁷⁵ The Act gives the Director of Trade Practices

unconscionability).

²⁶⁸ For a discussion of adhesion contracts, including examples of unconscionability, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

²⁶⁹ 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-302:7, at 282 (1992).

²⁷⁰ The more flexible characteristics of the doctrine represent its origins as an equitable doctrine. See Hunter, *supra* note 267.

²⁷¹ ZIEGEL, *supra* note 240, at 15.

²⁷² Trade Practice Act, R.S.B.C., ch. 406 (1979) (Can.). See generally ZIEGEL, *supra* note 240, at 13.

²⁷³ Trade Practice Act, R.S.B.C., ch. 406, § 3(1),(3) (1979) (Can.).

²⁷⁴ *Id.* § 3(3).

²⁷⁵ *Id.* § 4.

authority to define other unconscionable terms and behavior.²⁷⁶ In addition, the Director enjoys broad authority to enforce the Act.²⁷⁷ As noted below, most of the provinces prohibit disclaimers of warranties.

Mexican law allows a consumer to seek revision of the terms of an adhesion contract through the courts.²⁷⁸ In addition, the law establishes a public registry of adhesion contracts.²⁷⁹ Certain regulations intended to protect consumers may not be waived by contract.²⁸⁰ To this extent, the Mexican provision limits the role of contract more than the United States. Recent legislation invalidates an adhesion contract that gives the provider the ability to unilaterally modify the contract without assuming responsibilities under it, that eliminates the provider's responsibility except where the consumer fails to perform appropriate obligations, or that passes to the consumer or to a third person, the legal obligations of the provider.²⁸¹

Although the House of Deputies proposal appears to satisfy the United Nations Guidelines, the South American provisions impose more extensive regulation. The Mexican law is consistent with the South American regional standards. The United States would allow greater flexibility in these contracts because of the less clear restrictions imposed by the concept of unconscionability.

D. Responsibility regarding "durability, utility and reliability" of products

1. U.N. Guidelines

An important guideline admonishes governments to make clear the responsibility of producers regarding the "durability, utility and reliability" of products and services.²⁸² Another less central guideline emphasizes the importance of adequate post-sale service,

²⁷⁶ *Id.*

²⁷⁷ *Id.* §§ 5-12.

²⁷⁸ Vargas, *supra* note 23, at 371.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 359.

²⁸¹ L.F.P.C., art. 85-90 (Mex.).

²⁸² G.A. Res. 248, *supra* note 24, at 180.

such as providing spare parts.²⁸³

The Chilean proposals provide relief for "shorting" and for noncompliance of products with certain standards, most of which are express standards imposed by law or contract.²⁸⁴ Alternative remedies permit free repair, return of the good for replacement or return of the amount paid.²⁸⁵ The proposals also address service, including repair service.²⁸⁶ The Chilean proposals do not contain any requirement for the maintenance of adequate post-sale service.

The Chilean proposals do make clear the responsibilities of producers for the durability, utility and reliability of products and service. In this sense, they comply with the United Nations Guidelines.

2. *South American Statutes*

Like other South American statutes, the Chilean proposals contain provisions similar to the warranty of merchantability.²⁸⁷ Argentina, Brazil and Venezuela, however, do not permit the waiver of the minimum guarantees imposed by statute.²⁸⁸

The Chilean proposals also appear to limit consumer choice of a remedy more than several other comparable statutes. The Brazilian statute²⁸⁹ reflects the choice of consumer remedies available under the statutes of Argentina and Venezuela.²⁹⁰ In

²⁸³ *Id.*

²⁸⁴ See discussion *supra* notes 93-97 and accompanying text.

²⁸⁵ See discussion *supra* note 96 and accompanying text.

²⁸⁶ See discussion *supra* notes 119-31 and accompanying text.

²⁸⁷ See discussion *supra* note 97 and accompanying text.

²⁸⁸ E.g., DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 14, *translated in* JAFFE & VAUGHN, *supra* note 51, at 31-33 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 24, *translated in* JAFFE & VAUGHN, *supra* note 51, at 104 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 51-60, *translated in* JAFFE & VAUGHN, *supra* note 51, at 580-84 (Venez.).

²⁸⁹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 26, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

²⁹⁰ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 17, *translated in* JAFFE & VAUGHN, *supra* note 51, at 32-33 (Arg.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 51, *translated in* JAFFE & VAUGHN, *supra* note 51,

Brazil, if a supplier does not correct a defect within thirty days, the consumer may choose to replace the product with another one in the same or perfect condition, obtain a refund of the price paid with the option of seeking recovery for additional damages, or obtain a proportionate reduction in price.²⁹¹ Likewise, obligations applicable to repairs and services in the Brazilian and Venezuelan statutes are more detailed than those contained in the Chilean proposals.²⁹²

Other statutes in South America more effectively ensure adequate post-sale service. These post-sale obligations are particularly important for imported goods. Under the Venezuelan statute, after the manufacturer withdraws from a market, the manufacturer must continue to supply replacement parts for a "reasonable" period.²⁹³ In Brazil, the supply of a discontinued import must be maintained for a reasonable period of time.²⁹⁴ The statutes does not indicate the factors relevant in determining the length of such a "reasonable" period. Presumably, the character of the product, the extent of the marketing, the period of time during which the product had been imported, the number of units sold in the country, and the nature of replacement parts and the necessity of post-sale service would all be relevant to the determination of a reasonable period under the statute.

The other South American statutes suggest that although the Chilean proposals satisfy the most important U.N. guidelines,

at 580 (Venez.). The Venezuelan provision suggests that the choice of remedies is with the seller. *Id.*

²⁹¹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 26, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

²⁹² CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de Setembro de 1990, art. 18, *translated in* JAFFE & VAUGHN, *supra* note 51, at 99-101 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 56-59, *translated in* JAFFE & VAUGHN, *supra* note 51, at 582-84 (Venez.).

²⁹³ LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 60, *translated in* JAFFE & VAUGHN, *supra* note 51, at 584 (Venez.). Peru has a similar provision. PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 11, *translated in* JAFFE & VAUGHN, *supra* note 51, at 475 (Peru).

²⁹⁴ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de Setembro de 1990, art. 32, sole paragraph, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107-08 (Braz.).

these proposals are less extensive than other statutory provisions. Generally, however, they are comparable.

3. *North American Standards*

The North American provisions share several similarities with those of Chile. In the United States, the Uniform Commercial Code imposes implied warranties including the implied warranty of merchantability,²⁹⁵ analogous to requirements imposed by many of the South American statutes. The commercial code permits the disclaimer of the implied warranty under certain conditions, generally if the disclaimer is clear and mentions merchantability.²⁹⁶ Unconscionability acts as some restriction on disclaimers²⁹⁷ and tort law, controlling recovery for most product injuries, allows no disclaimer of tort-imposed obligations.²⁹⁸

The commercial code likewise provides for express warranty through affirmation, including statements about the performance of the good being purchased.²⁹⁹ Dispute continues about the character of reliance required under the code.³⁰⁰

In addition, the Magnuson-Moss Act sets out comprehensive standards regarding warranties and imposes requirements that

²⁹⁵ U.C.C. § 2-314 (1995). This section provides that: "[u]nless excluded or modified a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." *Id.* See generally, Debra L Goetz et al., *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1191-1212 (1987).

²⁹⁶ U.C.C. § 2-315 (1995). See generally, John R. Trentacosta, *Article 2—Warranties and Warranty Disclaimers*, 70 MICH. B. J. 278, 280 (1991).

²⁹⁷ The Uniform Commercial Code provides that an attempt to limit consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable. U.C.C. § 2-719 (1995).

²⁹⁸ See *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963) (establishing the principle that strict liability in torts may not be disclaimed).

²⁹⁹ U.C.C. § 2-316 (1995); see generally, Robert B. Weltner, *UCC Warranties*, in *WARRANTIES 1990*, at 287, 289 (PLI Comm. Practice Course Handbook Series No. 510, 1990), available in Westlaw, 540 PLI/Comm 287.

³⁰⁰ See Matthew A. Victor, *Express Warranties Under the UCC—Reliance Revisited*, 25 NEW ENG. L. REV. 477 (1990); Steven Z. Hodaszy, Note, *Express Warranties Under the Uniform Commercial Code: Is There A Reliance Requirement?*, 66 N.Y.U. L. REV. 468 (1991). But see, Robert S. Adler, *The Last Best Argument for Eliminating Reliance From Express Warranties: "Real World" Consumer Don't Read Warranties*, 45 S.C. L. REV. 429 (1994).

warranties must satisfy.³⁰¹ The Magnusen-Moss Act applies to consumer products and seems in many ways a model for the South American statutes. Any seller providing a written warranty must include in simple and understandable language: the names and addresses of the warrantors, the identity of the parties to whom the warranty is extended, the parts covered, what the warrantor will do in case of a defect or failure, what the consumer must do and the expense the consumer must bear, exclusion or exceptions, procedure the consumer must follow, information on any informal dispute resolution procedure, a description of legal remedies available to the consumer, the timing of the warrantor's obligations, how they will be performed, the period in which the consumer must notify the warrantor of a defect or failure of the product to conform to the warranty the characteristics of products of parts not covered, and a clear statement of the elements of the warranty.³⁰² The Act does not impose warranties or set the duration of any warranty but only prescribes requirements for warranties that are offered. The Act establishes minimum standards for warranties.³⁰³ The warrantor must remedy the defect without charge within a reasonable time and after a reasonable number of attempt to correct the defect, the warrantor must permit the consumer to elect a refund or a replacement without charge of the product or part.³⁰⁴ A warrantor may not impose any limitation the duration of any implied warranty of the product.³⁰⁵

In Canada, most warranty law is found in the provinces. Much of this warranty law rests on sale of goods legislation but some provinces, such as Saskatchewan creates direct warranties to consumers through the Saskatchewan Consumer Products Warranties Act or similar legislation.³⁰⁶ In addition, Ontario has a

³⁰¹ Christopher Smith, *Consumer Product Warranties Under the Magnuson-Moss Warranty Act*, in COMMERCIAL LAW 1985, at *127, *129 (PLI Comm. Practice Course Handbook Series No. 346, 1985), available in Westlaw, 346 PLI/Comm. 127 (explaining that the Act requires that warranties be written clearly, present the terms to the consumer in advance of the sale, prohibits certain disclaimers and provides remedies).

³⁰² 15 U.S.C. § 2302 (1994).

³⁰³ *Id.* § 2304.

³⁰⁴ *Id.* § 2304(a)(4).

³⁰⁵ *Id.* § 2304(a)(2).

³⁰⁶ ZIEGEL, *supra* note 240, at 13-14.

New Home Warranties Plan Act covering the construction and sale of new homes.³⁰⁷ Most of these statutes found in the Canadian provinces prohibit disclaimers of warranties.³⁰⁸

The Mexican Federal Consumer Protection Act of 1975 specifically relied upon terms of the Magnuson-Moss Act and incorporates the principles of that act.³⁰⁹ Particularly, "the terms and conditions of warranties must be clear and concise."³¹⁰ The terms, warranty or guarantee, may not be used unless the terms of the warranty are set out in detail.³¹¹ The provisions of recent Federal Consumer Protection Law are similar, requiring that a warranty set out its duration, conditions, satisfaction, redress for claims and the establishment of service outlets.³¹²

The North American standards also show that the Chilean proposal satisfy the most important U.N. Guidelines. Generally, the North American and Chilean proposals are comparable.

E. Health and Safety Regulation

1. U.N. Guidelines

One of the principles of the U.N. Guidelines emphasizes "protection of consumers from hazards to their health and safety."³¹³ Specific guidelines address this principle. Guidelines call for governments to ensure that products are safe "either for their intended or normally foreseeable use."³¹⁴ Manufacturers and distributors should inform consumers when they become aware of unforeseen hazards after products are marketed.³¹⁵ In addition, governments are encouraged to provide for recall or modification when a product is seriously defective or constitutes "a substantial

³⁰⁷ *Id.* at 14.

³⁰⁸ *Id.*

³⁰⁹ Vargas, *supra* note 23, at 345, 364.

³¹⁰ *Id.* at 364.

³¹¹ *Id.* The Secretariat of Commerce determines the minimum standards for warranties. *See id.*

³¹² L.F.P.C., art. 78 (Mex.).

³¹³ G.A. Res. 248, *supra* note 24, at 179.

³¹⁴ *Id.* at 180.

³¹⁵ *Id.*

and severe hazard even when properly used.”³¹⁶ These standards encompass informational requirements and substantive regulation.

The Senate version of the Chilean law fails to comply with this guideline for it eliminates any reference in the proposed statute to dangerous products and services.³¹⁷ Although the proposal of the House of Deputies imposes requirements to give warning regarding risks discovered before and after the marketing of the product, it fails to address other aspects of the guidelines.³¹⁸ For example, the proposal does not direct that products be safe for either their intended or normally foreseeable use, it does not address the recall or modification of products, and it lacks enforcement provisions specifically addressing these omitted issues. The weaknesses in the proposal of the House of Deputies permits the assertion that this proposal also fails to comply with the United Nations Guidelines regarding consumer health and safety.

2. *South American Statutes*

An examination of regional statutes in South America highlights the weaknesses of the proposal of the House of Deputies. The Brazilian statute illustrates a more comprehensive scheme to protect consumers from unsafe or dangerous products. The statute imposes a number of obligations on product suppliers to give adequate information to consumer, including any risks to health or safety created by the product.³¹⁹ Advertising must not mislead the consumer regarding the nature and characteristics of the product.³²⁰

In the Brazilian statute, product and service providers are liable for product defects that injure or damage consumers and for failure to provide adequate or sufficient information regarding risks and proper use of the product.³²¹ Liability is without “culpability” or

³¹⁶ *Id.*

³¹⁷ See discussion *supra* note 138 and accompanying text.

³¹⁸ See discussion *supra* notes 132-37 and accompanying text.

³¹⁹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 8, *translated in* JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

³²⁰ *Id.* art. 37(1), *translated in* JAFFE & VAUGHN, *supra* note 51, at 109 (Braz.).

³²¹ *Id.* art. 12, *translated in* JAFFE & VAUGHN, *supra* note 51, at 96-97 (Braz.).

fault and falls on both foreign and Brazilian manufacturers, producers, builders, and corporations.³²² Moreover, the statute reaches injuries to persons who were not the direct purchasers or users of the product by including liability to bystanders; it defines consumer for purposes of this liability as "all victims" of an injury-causing event.³²³

The Brazilian statute defines defect, the principal concept in the articulation of liability, as a product that does not offer the safety "rightfully expected of it."³²⁴ These rightful expectations rest upon all the relevant circumstances but include presentation of the product, uses and risks reasonably expected of it, and the time at which it was distributed.³²⁵ This definition of a product defect recalls the consumer expectations test used in the United States.³²⁶ Presumably, product presentation may include not only packaging of the product but also other presentation of the product to the public, including advertising, that create reasonable expectations regarding its safety.³²⁷ The statute specifically states that a product is not considered defective "simply" because a product of better quality has been placed on the market.³²⁸

Although liability is placed on all suppliers in the chain of distribution and sale of the product, the Brazilian statute assumes that the manufacturer, builder, producer or importer will be liable absent certain exculpatory circumstances³²⁹ and that the merchant or retailer will be liable only in the event of certain incriminating

³²² *Id.*

³²³ *Id.* art. 17, translated in JAFFE & VAUGHN, *supra* note 51, at 99 (Braz.).

³²⁴ *Id.* art. 12(1), translated in JAFFE & VAUGHN, *supra* note 51, at 97 (Braz.).

³²⁵ *Id.*

³²⁶ See generally, Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 638 (1995) (defining the consumer expectations test).

³²⁷ According to Professor Shapo the consumer expectations test recognizes "the central importance of the process by which expectations are created—by media among other forces." Marshall S. Shapo, *An ALI Report Markets A Defective Product: Errors at Retail and Wholesale*, 30 SAN DIEGO L. REV. 221 (1993).

³²⁸ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de Setembro de 1990, art. 12(2), translated in JAFFE & VAUGHN, *supra* note 51, at 97 (Braz.).

³²⁹ *Id.* The manufacturer, builder, producer or importer is liable unless it did not place the product on the market or unless there is no defect or a consumer or third party is exclusively culpable. *Id.*

circumstances.³³⁰ These provisions suggest significant potential liability for manufacturers and component part manufacturers.

The Brazilian statute seems to treat economic injuries resting on the failure of a product to perform the ordinary purposes for which it was designed separately from other injuries to the consumer. Economic injuries are covered by the provisions relating to defects in products and services and other injuries to consumers by the section on product and service liability referred to here as that for dangerous products.³³¹

The Brazilian statute creates administrative enforcement authorities with a wide range of sanctions. Specifically, a manufacturer commits a crime if the manufacturer fails to inform competent authorities and the consumer of the harmful or hazardous nature of the products that become known only subsequently to the placement of the product on the market,³³² or fails to withdraw hazardous or harmful products from the market when ordered to do so by appropriate authorities.³³³ Consumers also have a number of judicial remedies for injuries from defective products, including class actions.³³⁴

Although the Brazilian statute is the most extensive, other South American statutes likewise illustrate the weaknesses of the Chilean proposals. The statutes of Argentina and Venezuela as well as Brazil require the disclosure of product risks to the consumer.³³⁵ In addition, these statutes describe the characteristics

³³⁰ *Id.* art. 13, translated in JAFFE & VAUGHN, *supra* note 51, at 97-98 (Braz.). The merchant, or retailer, is liable if it is not possible to identify the manufacturer, or the product is supplied without clear identification of the manufacturer, or if the merchant does not adequately preserve perishable goods. *Id.*

³³¹ *See id.* art. 8, translated in JAFFE & VAUGHN, *supra* note 51, at 107 (Braz.).

³³² *Id.* art. 64, translated in JAFFE & VAUGHN, *supra* note 51, at 126 (Braz.). It is also a crime to fail to inform the consumer in easily readable form of the harmful and hazardous nature of products. *Id.* art. 63, translated in JAFFE & VAUGHN, *supra* note 51, at 125-26 (Braz.). Criminal liability is imposed for negligence *Id.* art. 63(2), translated in JAFFE & VAUGHN, *supra* note 51, at 126 (Braz.).

³³³ *Id.* art. 64.

³³⁴ *See generally id.* arts. 81-104, translated in JAFFE & VAUGHN, *supra* note 28, at 132-41 (Braz.).

³³⁵ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 6, translated in JAFFE & VAUGHN, *supra* note 51, at 27-28 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 9, translated in JAFFE & VAUGHN,

of dangerous products and provide damages for injury from them.³³⁶ In fact, Argentina, Ecuador, and Venezuela impose joint liability on manufacturers, importers, and sellers more extensive than that contained in the Brazilian statute;³³⁷ they also permit indemnification.³³⁸ Like Brazil, Peru requires that the seller or manufacturer notify consumers and government authorities of new or additional risks.³³⁹ In some instances the product provider must warn the public directly.³⁴⁰ The statute of Peru details a number of actions that may be required when the manufacturer or seller detects a previously unforeseen risk. The product provider must take steps to reduce the risk by notifying government officials and consumers, removing the product from sale, or providing for its repair or substitution.³⁴¹

supra note 51, at 95 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 45, *translated in* JAFFE & VAUGHN, *supra* note 51, at 577 (Venez.).

³³⁶ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 6, *translated in* JAFFE & VAUGHN, *supra* note 51, at 27-28 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 9, *translated in* JAFFE & VAUGHN, *supra* note 51, at 95 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 45, *translated in* JAFFE & VAUGHN, *supra* note 51, at 577 (Venez.).

³³⁷ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 40, *translated in* JAFFE & VAUGHN, *supra* note 51, at 43-44 (Arg.); LEY DE DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE LAW], Ley No. 520, de 12 de septiembre de 1990, art. 5, *translated in* JAFFE & VAUGHN, *supra* note 51, at 368 (Ecuador); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 55-58, *translated in* JAFFE & VAUGHN, *supra* note 51, at 582-83 (Venez.).

³³⁸ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 40, *translated in* JAFFE & VAUGHN, *supra* note 51, at 43-44 (Arg.); LEY DE DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE LAW], Ley No. 520, de 12 de septiembre de 1990, art. 5, *translated in* JAFFE & VAUGHN, *supra* note 51, at 368 (Ecuador); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 55-58, *translated in* JAFFE & VAUGHN, *supra* note 51, at 582-83 (Venez.).

³³⁹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 10(1), *translated in* JAFFE & VAUGHN, *supra* note 51, at 96 (Braz.); PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 10, *translated in* JAFFE & VAUGHN, *supra* note 51, at 474-75 (Peru).

³⁴⁰ PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 10, *translated in* JAFFE & VAUGHN, *supra* note 51, at 474-75 (Peru).

³⁴¹ *Id.*

Generally, Argentina, Brazil, and Venezuela define a dangerous product as one that poses a risk of harm to the consumer beyond those considered normal and foreseeable from the nature of the product.³⁴² In a similar vein, the Peruvian statute speaks in terms of products that do not provide the level of safety to which consumers have a right.³⁴³ Liability appears to be strict liability that focuses on the character of the product causing injury rather than on the conduct of the manufacturer.³⁴⁴ The Argentine and Brazilian statutes require a connection between the product and the injury as well as the existence of the defect in the product at the time it left the hands of the party sought to be held liable.³⁴⁵

In Argentina damages for consumer injuries include physical harm as well as consequential and emotional damages.³⁴⁶ Under the Brazilian statute injured consumers can seek judicial redress for injuries in addition to administrative and other remedies.³⁴⁷

³⁴² DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 5, *translated in* JAFFE & VAUGHN, *supra* note 51, at 27 (Arg.) (conditions foreseen or those of normal use); CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 8, *translated in* JAFFE & VAUGHN, *supra* note 51, at 95 (Braz.) (normal and foreseeable risks); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 51 *translated in* JAFFE & VAUGHN, *supra* note 51, at 580 (Venez.) (hidden vices or any other risk in accordance with the nature of the good).

³⁴³ PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 9, *translated in* JAFFE & VAUGHN, *supra* note 51, at 474 (Peru). Among the factors considered are the design of the product; the manner in which the product has been placed in commerce, including its appearance, advertising, instructions and warnings; the foreseeable use of the product; and the materials, content, and condition of the product. *Id.* art. 32, *translated in* Jaffe, *supra* note 51, at 483-84 (Peru).

³⁴⁴ Even when the statutes do not specifically provide for liability without fault, they focus on the product rather than on the conduct of the producer.

³⁴⁵ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 40, *translated in* JAFFE & VAUGHN, *supra* note 51, at 43 (Arg.) (liability for damages); CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 12-17, *translated in* JAFFE & VAUGHN, *supra* note 51, at 96-99 (Braz.) (product and service liability).

³⁴⁶ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 45, *translated in* JAFFE & VAUGHN, *supra* note 51, at 46-49 (ARG.).

³⁴⁷ CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 56, *translated in* JAFFE & VAUGHN, *supra* note 51, at 122-23 (Braz.); *cf.* PROMULGAN NORMA SOBRE

Informal procedures, class actions and the use of arbitration and conciliation seek to make the courts more accessible to consumers.³⁴⁸ The administrative remedies in Argentina, Brazil, and Venezuela are extensive and include advertising to alert consumers to newly discovered risks or hazards posed by products.³⁴⁹

Overall, the detail of the other South American statutes as well as their coverage, including the imposition of significant information requirements, of strict liability, of joint liability, and of extensive remedies, highlight the weaknesses of the Chilean proposals. The standards created by these regional statutes buttress arguments regarding the inadequacy of the Chilean proposals.

3. North American Standards

The North American provisions also act to insure that products are safe for their "intended or normally foreseeable" use.³⁵⁰ Although tort law in the United States varies from state to state, that law imposes liability upon products that cause injury because of a defect that makes them unsafe for their normal use.³⁵¹ Indeed, products liability law permits recovery for foreseeable misuses of the product.³⁵² An important theory of tort liability rests upon the reasonable expectations that product presentations create regarding the safety of the product.³⁵³ In addition, manufacturers and sellers

PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 39, *translated in* JAFFE & VAUGHN, *supra* note 51, at 488 (Peru).

³⁴⁸ CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 81-100, *translated in* JAFFE & VAUGHN, *supra* note 51, at 132-38 (Braz.).

³⁴⁹ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 50-55, *translated in* JAFFE & VAUGHN, *supra* note 51, at 51-53 (Arg.); CODICO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 10(2), *translated in* JAFFE & VAUGHN, *supra* note 51, at 96 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 91-110, *translated in* JAFFE & VAUGHN, *supra* note 51, at 602-09 (Venez.).

³⁵⁰ See generally *Escola v. Coca-Cola Bottling Co of Fresno*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J, concurring in judgement.).

³⁵¹ W. PAGE KEETON ET AL., *THE LAW OF TORTS* § 99 (5th ed. 1984).

³⁵² *Id.* § 102.

³⁵³ *Id.* § 99.

have obligations to warn consumers of dangers associated with products.³⁵⁴ Liability is often joint³⁵⁵ and bystanders usually recover for injuries caused by defective products.³⁵⁶ Clearly U.S. tort law imposes extensive liability upon producers for unsafe or dangerous products.

In addition, a number of federal regulatory agencies enjoy authority to establish standards for consumer products, to commence enforcement actions, and to seek recall or correction of unsafe products.³⁵⁷ The Consumer Product Safety Commission illustrates the character of the regulatory authority over consumer products. The Commission has authority to promulgate consumer product safety standard necessary to reduce "unreasonable" risks of harm to consumers.³⁵⁸ When a product poses a "substantial product hazard," the Commission may require a manufacturer to modify, to improve or to recall the product.³⁵⁹ Manufacturers must report to the Commission when they have a basis for concluding that their products pose a substantial product hazard.³⁶⁰ In addition, the Commission may ban a product creating an "imminent risk of harm." to consumers and may also require a recall of the product and public notice to consumers at the expense of the seller.³⁶¹ Consumer have a right to participate in Commission proceedings and to propose regulatory action.³⁶²

A variety of federal regulations require manufacturers to warn regarding product dangers and to provide consumers with

³⁵⁴ *Id.* See generally, Douglas R. Richmond, *Renewed Look at the Duty to Warn and Affirmative Defenses*, 61 DEF. COUNS. J. 205 (1994); Barbara Wrubel, *Liability for Failure to Warn or Instruct*, in LITIGATION, 1989, at 7, 9(PLI Lit. Practice Course Handbook Series No. 379, 1985), available in 379 PLI/Lit 7.

³⁵⁵ KEETON ET AL., *supra* note 351, § 100.

³⁵⁶ *Id.* See generally, Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. 687 (1993).

³⁵⁷ For a discussion of the regulatory responsibilities of consumer safety agencies such as the Food and Drug Administration, the Consumer Product Safety Commission, and the Department of Agriculture see generally ROTHCHILD & CARROLL, *supra* note 194. For a specific discussion of the Consumer Product Safety Commission see generally MICHAEL R. LEMOV, CONSUMER PRODUCT SAFETY COMMISSION (1983).

³⁵⁸ Lemov, *supra* note 357, § 2.08.

³⁵⁹ *Id.*

³⁶⁰ *Id.* § 2.09.

³⁶¹ *Id.*

³⁶² *Id.* § 2.11.

sufficient information regarding to insure safe use of the product.³⁶³ In many instances, these standards do not insulate a producer for liability in tort for product injuries.

In Canada, the provinces have sale of goods acts or specific warranty statutes imposing obligations on manufacturers to produce products safe for their normal and intended use.³⁶⁴ Ontario passed a consumer class action statute in 1992.³⁶⁵ Federal legislation imposes extensive safety regulation. "The Food and Drugs Act and the Hazardous Products Act severally regulate or prohibit the manufacture and/or sale of an enormously wide range of consumer products."³⁶⁶ In addition, the Motor Vehicle Safety Act requires automobiles sold in Canada to meet a number of safety specifications.³⁶⁷

In Mexico, the Secretariat of Health supervises food, medicine and related products.³⁶⁸ Producers must warn regarding product dangers and the government can take special action against products found to be "inherently dangerous."³⁶⁹ Recent federal Mexican consumer legislation reaffirms the basic principle of consumer law to protect the life, health, and safety of consumers from dangerous products and services.³⁷⁰ The legislation places special requirements on manufacturers to warn regarding the risks and dangers of product and to advice consumers how to reduce those risks in the use of the product.³⁷¹ Consumers may recover damages resulting from a violation of these requirements.³⁷²

The North American provisions illustrate standards for protection of consumers from dangerous products and regulatory schemes for the enforcement of those standards. The Chilean proposals compare unfavorably with these provisions.

³⁶³ *Id.*

³⁶⁴ ZIEGEL, *supra* note 240, at 13-14.

³⁶⁵ *See generally*, Class Proceedings Act, S.O. (1992, c.6).

³⁶⁶ ZIEGEL, *supra* note 246, at 15.

³⁶⁷ *Id.*

³⁶⁸ Vargas, *supra* note 23, at 361.

³⁶⁹ *Id.* at 365.

³⁷⁰ L.F.P.C., art. 1, § I (Mex.).

³⁷¹ L.F.P.C., art. 41 (Mex.).

³⁷² *Id.*

*F. Enforcement**1. U.N. Guidelines*

The United Nations Guidelines urge countries to adopt some enforcement mechanisms and to encourage consumer organizations to monitor improper practices harmful to consumer interests but do not recommend any particular approach to enforcement.³⁷³ Enforcement structures, powers, and sanctions are important because enforcement defines a statute; substantive standards that seem unlikely to be applied lose much of their force. Although appropriate structures, powers, and sanctions do not guarantee that statutory provisions are effectively applied, the lack of appropriate structures, powers and sanctions makes the application of the substantive standards less likely.

To the extent that the United Nations Guidelines only recommend that some enforcement mechanisms be used, the Chilean proposals arguably satisfy the guideline. Both the proposals of the House of Deputies and of the Senate provide for judicial enforcement, including the use of alternative dispute resolution and the use of fines to punish statutory violations.³⁷⁴ The House of Deputies also establishes a National Consumer Service with information collecting, coordinating, and conciliation functions and with authority to commence judicial proceedings.³⁷⁵

Because the guidelines imply a requirement of effective enforcement, arguments can be made that the Chilean proposals, particularly that of the Senate, fail to satisfy the guideline. The Senate proposal removes most of the power and authority of the National Consumer Service and leaves it with a limited role in the conciliation of consumer complaints.³⁷⁶ Both proposals limit the sanctions available to the courts.³⁷⁷

Judging whether any specific enforcement scheme is sufficient to effectuate statutory goals presents delicate and difficult

³⁷³ G.A. Res. 248, *supra* note 24, at 180-81.

³⁷⁴ See discussion *supra* notes 139-76 and accompanying text.

³⁷⁵ See discussion *supra* note 143 and accompanying text.

³⁷⁶ See discussion *supra* note 153 and accompanying text.

³⁷⁷ See discussion *supra* notes 164-72 and accompanying text.

questions; effectiveness requires an evaluation of the operation of a specific enforcement structure as well as the political, social, and cultural context in which it applies. For example, the extent to which a society feels bound by legal rules and the degree of social stigma attached to violations of those rules influences any evaluation of the effectiveness of enforcement. Still, some judgments about effectiveness can rely upon more general criteria. Of course, these general criteria may leave enough doubt about effectiveness to caution against a final conclusion about compliance with the guidelines but general criteria offer one basis for a reasoned judgment.

2. *South American Statutes*

The contemporary consumer laws of South America would place the Chilean proposals regarding enforcement structures, powers, and sanctions among the weakest in the region. Indeed, strong arguments support the conclusion that these proposals would create the weakest system of formal enforcement in South America.

The statutes of several South American countries such as Argentina, Brazil, and Venezuela establish powerful enforcement agencies that collect information, enforce standards, receive and adjudicate complaints regarding statutory violations, commence judicial proceedings, conduct testing and evaluation of products, publicize test results and administrative decisions.³⁷⁸ These agencies enjoy discretion in applying a variety of sanctions ranging from fines to product withdrawals and business closures.³⁷⁹

³⁷⁸ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE]; Ley 24.240, de 22 de setembro de 1993, art. 46, *translated in* JAFFE & VAUGHN, *supra* note 51, at 49 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 106, *translated in* JAFFE & VAUGHN, *supra* note 51, at 142-43; 106 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 63, *translated in* JAFFE & VAUGHN, *supra* note 51, at 586 (Venez.).

³⁷⁹ DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE], Ley 24.240, de 22 de setembro de 1993, art. 50-55, *translated in* JAFFE & VAUGHN, *supra* note 51, at 51-53 (Arg.); CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 55-60, *translated in* JAFFE & VAUGHN, *supra* note 51, at 121-25 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 91-110, *translated in* JAFFE & VAUGHN, *supra* note 51, at 602-09 (Venez.).

These statutes, therefore, create agencies that are proactive in furtherance of the goals of consumer protection; none are as limited as the consumer agency would be under the broadest of the Chilean proposals.

Although not as extensive as those of Brazil, Argentina and Venezuela, the other South American countries, Colombia, Ecuador, and Peru, provide for administrative enforcement that appears more effective than the Chilean proposals. Colombia³⁸⁰ and Peru³⁸¹ create both national and local administrative agencies with enforcement powers that go beyond the powers of conciliation given to the Chilean consumer service. Of the three, Ecuador by relying more upon the courts³⁸² appears closest to the Chilean proposal.

These other South American statutes also provide for judicial as well as administrative enforcement.³⁸³ The most extensive, that of Brazil, authorizes group representation, including class actions, and permits a greater range of judicial sanctions in enforcement actions.³⁸⁴ None leave the courts with the limited sanctions provided in the Chilean proposals.

Although the U.N. Guidelines do not impose any requirements regarding enforcement, they do articulate the importance of encouraging consumer organizations to monitor improper

³⁸⁰ In Colombia, Decree No. 3466 of December 2, 1982 gives the Superintendency of Industry and Commerce extensive regulatory powers. Decree No. 2153 of December 30, 1992, restructures the Superintendency of Industry and Commerce and authorizes additional consumer protection activities. Decree No. 1141 of May 24, 1982 regulates the functioning of consumer leagues and associations which are given enforcement powers at a local level.

³⁸¹ PROMULGAN NORMA SOBRE PROTECCION AL CONSUMIDOR [PROMULGATE NORM REGARDING CONSUMER DEFENSE], Ley No. 716, de 11 de noviembre de 1991, art. 39-47, *translated in* JAFFE & VAUGHN, *supra* note 51, at 486-89 (Peru).

³⁸² LEY DE DEFENSA DEL CONSUMIDOR [CONSUMER DEFENSE LAW], Ley No. 520, de 12 de septiembre de 1990, art. 35-57, *translated in* JAFFE & VAUGHN, *supra* note 51, at 380-90 (Ecuador).

³⁸³ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 56, *translated in* JAFFE & VAUGHN, *supra* note 51, at 122-23. Even the Brazilian statute, which relies heavily on administrative enforcement, gives the courts significant powers. *Id.*

³⁸⁴ *E.g.*, CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 91-100, *translated in* JAFFE & VAUGHN, *supra* note 51, at 136-38 (Braz.) (creating national consumer class actions).

practices harmful to consumers.³⁸⁵ Therefore, the guidelines stress the importance of the involvement of consumer organizations.

Given the importance of consumer organizations in enforcement, the Chilean proposals assume a limited formal role for consumer groups.³⁸⁶ Although consumer organizations may pursue consumer rights, they are to perform limited functions in enforcement. Indeed, the Senate proposal could be interpreted to affect adversely the viability of consumer organizations.³⁸⁷

In contrast, many other South American statutes, including Brazil and Venezuela give consumer organizations important roles in administrative and judicial enforcement.³⁸⁸ Consumer rights and government responsibilities regarding consumer protection emphasize the importance of consumer organizations.³⁸⁹ In addition, to these statements of principle, Brazil and Venezuela permit consumer organizations to present administrative complaints and other proposals, and disseminate information including test results.³⁹⁰ Consumer groups are often expressly given roles in the administrative process.

Likewise, Brazil gives consumer organizations important roles in judicial enforcement.³⁹¹ Consumer organizations can represent

³⁸⁵ G.A. Res. 248, *supra* note 24, at 180.

³⁸⁶ See discussion *supra* notes 173-76 and accompanying text.

³⁸⁷ See discussion *supra* notes 173-76 and accompanying text.

³⁸⁸ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, arts. 55(3), 81-82 *translated in* JAFFE & VAUGHN, *supra* note 51, at 122, 132-33 (Braz.) (administrative and judicial process); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, arts. 68, 91-92, *translated in* JAFFE & VAUGHN, *supra* note 51, at 588-89, 602-03 (Venez.) (administrative and judicial process).

³⁸⁹ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 6, *translated in* JAFFE & VAUGHN, *supra* note 51, at 93-94 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 2(8), *translated in* JAFFE & VAUGHN, *supra* note 51, at 561 (Venez.).

³⁹⁰ CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 106-06, *translated in* JAFFE & VAUGHN, *supra* note 51, at 142-43 (Braz.); LEY DE PROTECCION AL CONSUMIDOR [LAW OF CONSUMER PROTECTION], Ley No. 4.403, de 20 de febrero de 1992, art. 68, 77(20), *translated in* JAFFE & VAUGHN, *supra* note 51, at 588-89, 596 (Venez.).

³⁹¹ *E.g.*, CODIGO DE PROTECAO DO CONSUMIDOR BRASILEIRA [BRAZILIAN CONSUMER PROTECTION CODE], Lei No. 8078, de 11 de setembro de 1990, art. 81, *translated in*

consumers and are given a role in class action provisions under some statutes.³⁹² The experience under the Brazilian consumer statute emphasizes the importance of consumer organizations in judicial enforcement of the law.³⁹³

Against this regional background it is easier to argue that the Senate proposal is not credible. Even the House of Deputies proposal seems anemic within this regional context.

The statutes of South America provide more extensive options for enforcement than the Chilean proposals. In particular, these regional standards rely more heavily upon administrative enforcement, give consumers a greater role in administrative regulation, and in judicial proceedings than either of the Chilean proposals.

3. *North American Standards*

The North American countries also illustrate a regional context in which more extensive enforcement authority is provided. Consumers in the United States may seek redress for a variety of producer misconduct through the courts.³⁹⁴ In addition, federal, state, and local agencies may employ extensive powers to enforce consumer protection provisions.³⁹⁵ These powers often include product seizures, product recalls, fines, civil penalties, and publicity;³⁹⁶ they may acquire information from regulated parties and require compliance with specific agency rules and regulations.³⁹⁷ In addition, violation of many consumer provisions can generate criminal liability.³⁹⁸ Federal law permits consumer access to agency information collected about unsafe products or violation of consumer laws as well about the performance of

JAFFE & VAUGHN, *supra* note 51, at 132 (Braz.).

³⁹² *Id.*

³⁹³ In a presentation to an international seminar on consumer protection in Santiago, Chile, on May 25-27, 1992, Marilena Lazzarini, the President of the Brazilian Institute of Consumer Defense called the consumer class action provision the legal right that "stands out the most." These actions permitted the vindication of consumer interests in many circumstances where individual consumers were unable or unwilling to do so.

³⁹⁴ See ROTHCHILD & CARROLL, *supra* note 194, at ch. 20-24.

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

agencies in enforcing those laws.³⁹⁹

Judicial remedies can be extensive. Consumer class actions can be brought in federal courts, subject to jurisdictional requirements, and in state courts.⁴⁰⁰ Consumer groups may actively participate in litigation and in the administrative process.

In Canada, both the federal and provincial governments have created a range of regulatory and enforcement bodies with a variety of enforcement powers.⁴⁰¹ Like the United States, citizen can acquire information collected by governmental agencies as well as information about the performance of those agencies.⁴⁰² The British Columbia Trade Practice Act illustrates a provision permitting consumers to become involved in the administrative process and to commence actions before the courts.⁴⁰³

Consumers in Canada can seek redress before the courts with some consumer laws providing for the recovery of punitive damages in appropriate cases.⁴⁰⁴ In addition, several provinces have enacted consumer class action provisions,⁴⁰⁵ provisions permitting consumer groups to initiate actions on behalf of large groups of consumers.

One of the important principles of Mexican consumer law stresses that consumer should be able to use administrative procedures to change or correct misleading practices or unfair treatment.⁴⁰⁶ This principle is "organic" in that it ranks just below the constitution as a basic guideline for government.⁴⁰⁷ The most recent federal Mexican Consumer legislation adds to the enforcement of the consumer provisions. Administrative officials

³⁹⁹ 5 U.S.C. § 552 (1994). For a discussion of the role that the Federal Freedom on Information Act has played in disclosing information about consumer products see generally EVAN HENDRICKS, *FORMER SECRETS: GOVERNMENT RECORDS MADE PUBLIC THROUGH THE FREEDOM OF INFORMATION ACT* (1982).

⁴⁰⁰ *E.g.*, FED. R. CIV. P. 23.

⁴⁰¹ ZIEGEL, *supra* note 240, at 12-15.

⁴⁰² Access to Information Act, R.S.C., ch. A-1 (1985) (Can.); *See generally* McCamus, *Freedom of Information in Canada*, 10 GOV'T PUBLICATIONS REV. 51 (1983).

⁴⁰³ British Columbia Trade Practice Act, R.S.B.C., ch. 406, §§ 5, 7, 18 (1979).

⁴⁰⁴ ZIEGEL, *supra* note 240, at 13-14.

⁴⁰⁵ *Id.*

⁴⁰⁶ Vargas, *supra* note 23, at 353.

⁴⁰⁷ *Id.* at 359.

are given responsibility for enforcement of provisions of the law and the statute creates a consumer attorney with power to represent consumer interests before the courts.⁴⁰⁸

Like those of South America, the North American statutes provide more extensive options for enforcement than the Chilean proposals. In particular, both sets of regional standards rely more heavily upon administrative enforcement, give consumers a greater role in administrative regulation, and in judicial proceedings than either of the Chilean proposals.

G. Summary of Evaluation of the Chilean Proposals

Generally, the application of the United Nations Guidelines for Consumer Protection to the proposals in light of the standards of South suggest major deficiencies in those proposals. On their face, the proposals seem not to comply with several of the guidelines. For example, on its face the Senate proposal fails to satisfy the guidelines regarding the health and safety of consumer;⁴⁰⁹ likewise it fails to meet the guideline requiring protection of consumers from contract abuses.⁴¹⁰

Examination of the proposals against the Guidelines in light of the regional standards also suggest weakness in satisfying the Guidelines. For example, the proposal of the House of Deputies concerning protection of consumer health and safety seems deficient in light of the regional standards of South America.⁴¹¹

In other instances, although the Chilean proposals arguably comply with the Guidelines, examination of the proposals against the regional standards casts doubt on that compliance. For example, the Chilean proposals relating to the protection of consumers from abuses regarding credit and relating to the provisions of consumer information falter when compared to the regional standards.⁴¹²

Even when the Chilean proposals seem to comply with the U.N. Guidelines, application of regional standards reveals that

⁴⁰⁸ L.F.P.C., art. 24, § 3 (Mex.).

⁴⁰⁹ See discussion *supra* notes 313-18 and accompanying text.

⁴¹⁰ See discussion *supra* notes 313-18 and accompanying text.

⁴¹¹ See discussion *supra* notes 181-83 and accompanying text.

⁴¹² See discussion *supra* notes 184-91 and accompanying text.

compliance lags significantly behind the most extensive South American statutes. For example, the Chilean proposals regarding producer responsibility for the durability, utility and reliability of products⁴¹³ as well as the House of Deputies proposal regarding protection from contractual abuses⁴¹⁴ fit this category.

Finally, the Senate proposal provides a less credible enforcement regime than that of the House of Deputies. Under a narrow view of the Guidelines, the House of Deputies proposal seems adequate. Under a broader view of the Guidelines, only the reservations and restraint that accompany comparative analysis prevent the conclusion that the proposal is inadequate. Still, enforcement provided in the proposal of the House of Delegates appears particularly anemic compared to the standards of South America.⁴¹⁵

Most disturbing is the failure of the Chilean proposals to satisfy the U.N. Guidelines regarding protection of consumer health and safety. These guidelines emphasize the importance of the principle of consumer health and safety. The failure of the proposals to meet these guidelines generates particular concern in part because of the clear applicability of product safety standards to trade issues raised in the NAFTA.

IV. Implications

The Chilean consumer protection proposals arguably fail to comply with several important guidelines established by the United Nations. These proposals often fall below the regional standards arising from the statutory provisions of South America and in none of the areas addressed by the U.N. Guidelines do the Chilean proposals meet the standards imposed by the most extensive South American statutes.

The deficiencies of the Chilean proposals seem surprising given the number of models available, particularly in South America. Indeed, the initial Chilean proposals considered, among others, the U.N. Guidelines, the Brazilian Code and the Mexican Consumer Protection Statute of 1975. Against this background, the

⁴¹³ See discussion *supra* notes 282-86 and accompanying text.

⁴¹⁴ See discussion *supra* notes 282-86 and accompanying text.

⁴¹⁵ See discussion *supra* notes 378-93 and accompanying text.

Senate version of the consumer protection law seems extraordinarily deficient. Speculation as to the reasons for the deficiencies in the Chilean proposals should be approached with caution. The roles and influence of interest groups is hard to evaluate and the nuances of legislative deliberation are difficult to capture even in one's own culture. Perhaps all that can reasonably be concluded is that free market ideology has played a prominent role in the growth and successes of the Chilean economy and in the formulation of these proposals.

The adherence to and the success of free market principles permit very effective arguments for resisting government regulation as an intrusion into the market. Many of the deviations from regional standards of the Chilean proposals, particularly those of the Senate, fit easily into these arguments; for example, the reliance on contract to alter standards imposed by law and to waive rights held by consumers as well as the removal of any significant administrative structure suggest an aversion to government regulation of the market. The inclusion in the Senate version of consumer "responsibilities" as well as rights establishes a tone that reflects a belief in the ability of the market to adjust the interests of producers and consumers and a rejection of arguments for regulation relying on examples of market failure.

Therefore, the adherence of the Chilean proposals to this ideology rests on a theoretical view of the market that is highly unrealistic in practice. The regional consumer protection statutes of South America illustrate this point. Like the Chilean proposals, these statutes rest upon an acceptance of a free market economy. The differences between these regional statutes and the Chilean proposals result from recognizing that markets are imperfect and, more specifically, that markets in consumer goods contain imperfections requiring intervention. Adequate and accurate consumer information empowers consumer choice and efficient market decisions. Inadequate or inaccurate information undermines the market and can harm and endanger consumers. Likewise, recognition of the superior bargaining power of many producers inclines intervention to aid consumers.

Indeed, consumer laws are seen as supporting free market economies; it is no coincidence that the explosion of consumer protection statutes in South America since 1990 followed the

introduction of free market reforms. Consumer information provisions support efficient markets and restrictions on abusive practices and, along with minimum standards, increase confidence in the market, thereby bolstering rather than weakening it. For these reasons consumer laws help ensure that consumers receive higher quality goods at less cost. Consumer power benefits producers not only in a domestic sense but also internationally because more demanding national consumers can strengthen the international competitiveness of producers.

If the deficiencies in the Chilean proposals reflect an aversion to government regulation of the market, then these deficiencies ironically echo debate about the U.N. Guidelines themselves. The Reagan administration successfully objected to the creation of binding international standards, opposed discussion of specific products in the Guidelines, resisted successfully placing responsibilities on producers and sellers rather than on governments, and suggested weakening several portions of the Guidelines.⁴¹⁶ These actions rested on the fear of interference with the market and with international trade.⁴¹⁷ Indeed, one of the U.S. participants in the negotiations of the Guidelines attacked their adoption as an ill conceived attempt at regulation of private markets.⁴¹⁸ The final Guidelines, however, reflect a view that market imperfections, including consumer access to information, consumer difficulties in the evaluation of information, and inequitable bargaining power justified government regulation to protect consumers and to support the market. The opposition to the Guidelines as improper interference with the market, followed by their adoption and successful implementation, illustrates the

⁴¹⁶ These positions of the United States are confirmed by summaries of the negotiations. See U.N. GAOR, U.N. Doc. A/C.2/39/L.2 (1984) (recording comments of the United States and of other nations); U.N. ESCOR, U.N. Doc. E/1984/51 (1984). An official press release of the United States on the approval of the Guidelines emphasizes the nature of the U.S. objections, particularly the fear of government intervention in the market. United States Mission to the United Nations, Press Release USUN 22-(85), Apr. 9, 1985.

⁴¹⁷ United States Mission to the United Nations, Press Release USUN 22-(85), Apr. 9, 1985.

⁴¹⁸ Murray Weidenbaum, *The Case Against the U.N. Guidelines for Consumer Protection*, 10 J. CONSUMER POL'Y 425, 426 (1987). Regulation "can be an imperfect, costly, and at time counterproductive instrument." *Id.* at 431.

philosophy of consumer protection in the Guidelines.

Understanding the consumer laws of other countries requires more than a section by section analysis of individual provisions; it requires an appreciation of the ideological perspective reflected in those provisions. Consideration of trade agreements in both South and North America should emphasize the importance of examining the consumer laws of other countries in terms of both the specific statutes of a particular country and the philosophy of consumer protection underlying them. The U.N. Guidelines offer a structure and provide a philosophy that can inform that examination.

The deficiencies of the Chilean proposals highlight a number of concerns regarding the expansion of NAFTA and MERCOSUR. Ironically, to the extent that these proposals represent an unwavering adherence to an extreme vision of a free market economy, they may undermine rather than strengthen that ideal not only in the ways discussed above but also by impacting Chilean acceptance into free trade zones in both North and South America.

